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Supreme Court, U.S.

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NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,
Petitioner,

v.

WILLIAM DUANE ELLEDGE, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER ELEVENTH CIRCUIT INCORRECTLY BALANCED STATE'S INTEREST IN APPROPRIATE COURTROOM SECURITY ARRANGEMENTS, TO PROVIDE FOR SAFETY OF COURTROOM PERSONNEL IN FACE OF RESPONDENT'S THREATS, AGAINST RESPONDENT'S SIXTH AMENDMENT RIGHTS, BY CONCLUDING THAT SHACKLING OF ALREADY-CONVICTED MURDERER, AT STATE CAPITAL SENTENCING PHASE, IS INHERENTLY PREJUDICIAL TO SAME EXTENT AS AT TRIAL, PRIOR TO CONVICTION.

II.

WHETHER ELEVENTH CIRCUIT INCORRECTLY INTERPRETED RESPONDENT'S RIGHTS TO FAIR TRIAL, AND DUE PROCESS, BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF STATE TRIAL COURT, ON IMPOSITION OF SHACKLING ON ALREADY-CONVICTED FELON AT SENTENCING, AND IMPOSING REQUIREMENT THAT STATE TRIAL COURT CONDUCT SUA SPONTE INQUIRY, BEFORE ORDERING SUCH SHACKLING.

SECTION 100

THESE RESULTS SHOW THAT THE
RESEARCHERS HAVE BEEN SUCCESSFUL
IN IDENTIFYING THE FACTORS
WHICH AFFECT THE GROWTH OF
THE PLANT. THE RESULTS ARE
AS FOLLOWS: THE GROWTH OF
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AND NUTRIENTS. THE GROWTH
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THE RESULTS OF THE RESEARCH
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I.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
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Petitioner **RICHARD L. DUGGER**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal, for the Eleventh Circuit, entered on July 20, 1987. A modified opinion was entered, on petitions for rehearing filed by the parties, on November 10, 1987.

CITATIONS TO OPINIONS BELOW

The original opinion of the Court of Appeals, for the Eleventh Circuit, is officially reported at 823 F.2d 1439 (11th Cir. 1987), and is set out in the Appendix hereto (to be referred to by "A" , followed by page number). at A, 1-84, infra.

The modified opinion of the Court of Appeals, officially reported at 833 F. 250 (11th Cir. 1987), and is reproduced in the Appendix, at A, 85-90 infra.

The decision of the United States District, Southern District of Florida, issued on September 5, 1985, is not yet officially reported, and is set out at A; 91-146 infra.

The decision of the Supreme Court of Florida, relevant to the issues raised herein, is reported at 408 S.2d 1021 (Fla. 1981), cert. denied, 459 U.S. 981 (1982), and is reprinted at A, 147-158 infra.

JURISDICTION

The judgment and decision of the Court of Appeals was filed on July 20, 1987, and Petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied on November 10, 1987. This Court's jurisdiction is invoked, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

Amendment VI of the Constitution, provides, inter alia, as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Amendment XIV, states, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

William Duane Elledge was convicted of the first-degree murder and rape of Margaret Anne Strack in March, 1975, in Hollywood, Florida, and sentenced to death on the murder charge. This sentence was imposed concurrently with a fifty year sentence for rape, and consecutively to a life sentence imposed upon Elledge in Jacksonville, Florida, for the commission of the murder of Kenneth Nelson. Following

his arrest for the Nelson murder, Elledge confessed to killing Ms. Strack, Mr. Nelson and Edward Gaffney, all within approximately thirty-six hours. Elledge v. State, 346 S.2d 998, 999-1000 (Fla. 1977).¹ The Florida Supreme Court affirmed the conviction, but reversed Elledge's death sentence, because of the State's use of an unconvicted offense (at that time, Elledge had not yet been convicted of the Gaffney murder) as an impermissible non-statutory aggravating circumstance. Elledge, 346 S.2d, at 1002.

In September, 1977, Respondent was again sentenced to death for the Strack homicide, following a jury advisory recommendation of death (Sentencing

¹ Other particularized facts about the crime, are detailed in Elledge v. State, 346 S.2d, supra. at 999-1000.

Transcript, at 394-400).² At the outset of Elledge's re-sentencing proceedings, and outside the presence of the jury, the trial judge made the following statements, outlining his reasons for placing Elledge in leg irons, during the sentencing proceedings:

THE COURT: We will be in recess, gentlemen, for twenty minutes. I want to put something else on the record, too, before the jury gets in here.

I received information from Chief Miro yesterday, the Chief of Detention for the Broward Sheriff's Office.

He told me he received information from two of the Lieutenants -- one in the jail, and one in the Detective Division -- that

² Further references to the August, 1977 transcript of Elledge's re-sentencing proceedings, will be by the symbol "ST", followed by a page number.

Mr. Elledge had become a karate expert, while in prison -- apparently; and he was going to attack my Bailiff, either on the way to the courtroom or in the courtroom today, because he had nothing to lose -- he is now serving two life sentences, plus fifty years for rape; and he is facing a death penalty, or another life sentence, arising out of this situation; that he has been adjudged guilty of these particular crimes.

In an abundance of precaution, I entered an Order to leave Mr. Elledge in leg irons here in these proceedings.

(ST, 10-11). Elledge's counsel, who had vigorously sought a continuance of the sentencing proceeding, just before this ruling, ST, 3-10, made a general objection to the shackling. (ST, 11). Elledge himself asked if he could "say something", and the trial court declined, thereafter recessing the proceedings for a short period. (ST, 11). Voir dire was

thereafter conducted, with a sentencing jury finally empanelled,³ (ST, 11-198), and the sentencing proceedings conducted. (ST, 198-401). Subsequent to the trial court's ruling, placing physical restraints on Elledge, neither Elledge or defense counsel otherwise objected to the restraints. Furthermore, Elledge did not request that the jury be polled, individually or collectively, as to the possible effect of Elledge's shackling on their responsibilities as jurors, or on their advisory sentence recommendation; did not ask for any form of instruction, either curative or cautionary on the issue; did not suggest any other possible alternatives to shackling; and did not seek, by offer or proffer

³This separate empanelling of a sentencing jury was made necessary, because Elledge had plead guilty to the Strack murder charge, in 1975.

of evidence, or request for a hearing, to challenge, contest or otherwise respond to the factual basis for the trial court's shackling order. To this day, there has been no such specific challenge, in any of Elledge's state or Federal proceedings.

During opening argument at sentencing, the State conveyed to the jury, that Elledge had pled guilty to the Strack murder. (ST, 200). Defense counsel himself, revealed, inter alia, that Elledge had confessed to, and admitted his guilt of the murders he committed. (ST, 204). Elledge's guilty plea, to the Nelson homicide, in October 1974, was admitted into evidence by the Court, as stipulated to by State and defense. (ST, 302). The State's evidence included, inter alia, Elledge's transcribed confession to the Strack murder, to police, which was played for the jury (ST; 233); and the testimony

of murder victim Kenneth Nelson's wife and son, (ST, 273-301), that included Elledge's threats to kill, while robbing the Nelsons, stating "I have already killed two people this week; and if you don't believe me, read the Hollywood papers . . . one more don't matter" (ST, 278, 282; 296). Additionally, in Elledge's own testimony, he confessed to all three killings, and the additional rape of Margaret Strack and robbery of Nelson. (ST, 328, 337-334, 335, 337, 343, 348, 353, 358-360). Defense counsel relied on such numerous confessions by Elledge, both in-court and out-of-court, as possible mitigation to be considered by the jury, in recommending a sentence. (ST, 385).

Elledge initially challenged his shackling at sentencing on direct appeal from his 1977 sentence of death. Elledge v. State, 408 S.2d 1021, 1022 (Fla. 1981).

The Florida Supreme Court specifically distinguished Elledge's position and status as "a confessed murderer of three persons", from cases involving the impact of shackling restraints on a defendant's presumption of innocence. Elledge, 408 S.2d, at 1022. The Court found no prejudice, and that the court was justified in relying on information that Elledge threatened to hurt the bailiff, concluding that Elledge "was an avowed dangerous individual . . . [and] through his confessed acts had proven himself a man of his word when violence was threatened"

Elledge, 408 S.2d, at 1023. This Court denied certiorari, when Respondent sought review of this opinion. Elledge v. Florida, 459 U.S. 981 (1982).

On review of this claim, in Elledge's Federal habeas corpus petition, the District Court concluded that Petitioner's

shackling "was not an abuse of discretion" by the state trial judge, in light of his "fear" for the safety of those participating in the trial. Elledge v. Wainwright, Case No. 83-6176-CIV-EBD, September 5, 1985, slip op, at 12. (A, 116. The District Court referred to the Florida Supreme Court's resolution of this issue. Id. (A; 116).

The Eleventh Circuit panel majority, concluded that the shackling of Elledge, was inherently prejudicial to his rights to a fair sentencing proceeding. Elledge, 823 F.2d, at 1450. (A; 49-52). Although conceding that there was "no definite answer" to the prejudicial impact of shackling, if any, on an already-convicted, confessed murderer at a capital sentencing hearing, the majority equated cases involving restraints at trials, with those involving restraints of a defendant at sentencing.

Elledge, at 1450-1451. (A; 51-52). Despite Elledge's failure to challenge the stated factual basis for shackling, or request a hearing, curative instruction, polling or less restrictive alternatives, the majority determined that he was prejudiced by the absence of an opportunity to challenge the court's stated basis for shackling.

Elledge, at 1452-1453. (A; 55-59). Circuit Judge Edmondson, in his dissenting opinion, distinguished the circumstances and effect, of shackling at trial, from shackling at a capital sentencing, and concluded that the basis for this distinction, was that Respondent's entitlement to a presumption of innocence, no longer existed at his sentencing. Elledge, 823 F.2d, at 1453, 1454. (Edmondson, C.J., concurring in part, dissenting in part; (A; 65, 68-70). In his opinion, Circuit Judge Edmondson criticized the majority, for an unwarranted creation

of a Constitutional right, for convicted felons, to a pre-shackling hearing. Judge Edmondson further stated that the majority opinion was unsupported by analagous Federal decisions, and was an unjustified lack of deference to the State trial court's conclusions and reasoning.

Elledge, 823 F.2d, at 1456-1457.

(Edmondson, C.J, concurring in part, dissenting in part). (A, 67-72).

Furthermore, Judge Edmondson recognized that a convicted murderer created additional threats to courtroom security, and that jurors ". . . would not be surprised at -- and probably would endorse -- the practice of physically restraining felons convicted of violent crimes when the felons are removed from the controlled environment of their penal institutions."

Elledge, 823 F.2d, at 1455. The dissent thus concluded that Elledge was not

inherently or actually prejudiced by being shackled. Elledge, 823 F.2d, at 1452-1456. (A; 61-80).

In dissenting from the denial of rehearing and/or rehearing en banc, as sought by Petitioner, four members of the Eleventh Circuit concluded that Judge Edmondson's dissenting opinion represented the correct analysis and result, on the issue of Elledge's shackling at sentencing. (A; 86-90). The four members, joining in a dissent written by Circuit Judge Fay, criticized the panel majority, for placing physical restraints at sentencing, on a convicted felon who pled guilty, "in the same posture" as a defendant at the guilt/innocence phase. (A; 87). Judges Fay, Tjoflat, Hill and Edmondson further attacked the panel majority's analysis, in "faulting" the trial court's failure to further examine

the issue, when the trial court was not asked to do so, in any respect, by Elledge's counsel. (A; 87-88). The dissenting panel further noted the panel majority's failure to accord deference, on collateral review of a State judgment and sentence by a Federal court, to the State Court's findings and proceedings, in accordance with this Court's precedent.

(A; 89.)

REASONS FOR GRANTING THE WRIT

I.

ELEVENTH CIRCUIT INCORRECTLY BALANCED STATE'S INTEREST IN APPROPRIATE COURTROOM SECURITY ARRANGEMENTS TO PROVIDE FOR SAFETY OF COURTROOM PERSONNEL, IN FACE OF RESPONDENT'S THREATS, AGAINST RESPONDENT'S SIXTH AMENDMENT RIGHTS, BY CONCLUDING THAT SHACKLING OF ALREADY-CONVICTED MURDERER, AT STATE CAPITAL SENTENCING PHASE, IS INHERENTLY PREJUDICIAL TO SAME EXTENT AS AT TRIAL, PRIOR TO CONVICTION.

This Court, in its prior opinions, dealing with the impact of various forms of physical restraints placed on an unconvicted defendant at a criminal trial, has consistently relied on the existence or lack of prejudice to the defendant's presumption of innocence, as embodied in the Sixth Amendment right to a fair trial. Holbrook v. Flynn, 475 U.S. _____, 106 S.Ct. _____, 89 L.Ed.2d 525, 533-536

(1986); Estelle v. Williams, 425 U.S. 501 (1976); United States ex rel Illinois v. Allen, 397 U.S. 337 (1970). A defendant's entitlement to physical indicia of the presumption of innocence, and consideration by the jury of the question of guilt or innocence, based solely on evidence, have been the linchpin of the analysis of this, and other Federal courts, reviewing various forms of physical restraints. Holbrook Supra; Estelle, Supra; United States v. Hack, 782 F.2d 862 (10th Cir. 1986); (shackles); United States v. Fountain 768 F.2d 790 (7th Cir. 1985); (same); Brofford v. Marshall, 751 F.2d 845 (6th Cir. 1985); (same); Allen v. Montgomery, 728 F.2d 1409 (11th Cir. 1984); (handcuffs, increase in guards); Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983); (shackles); Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982); (shackles); United States v. Theriault, 531

F.2d 281 (5th Cir. 1976) (shackles). In determining the prejudicial impact of enhanced security measures taken at a trial, this Court, and other Federal courts, have balanced the State's interest, in appropriately providing for particular courtroom security measures, for legitimate safety reasons, against a defendant's right to be tried, without restraints. Holbrook, 89 L.Ed.2d, at 533-536; Allen, 397 U.S., Supra, at 343-344; Hack, 782 F.2d, Supra, at 867; Wilson v. McCarthy, 770 F.2d 1482, 1484 (9th Cir. 1985); Zygadlo, 720 F.2d, Supra, at 1223.

Both the Eleventh Circuit majority and dissenting opinions, in this case, specifically observed that no Federal court, including this Court, had ever examined or addressed the impact of physical restraints, on an already-convicted defendant, imposed at a capital sentencing

phase. Elledge v. Dugger, 823 F.2d 1439, 1450 (11th Cir. 1987); Elledge, 823 F.2d, supra, 1453-1454; 1455 n. 6 (Edmondson, C.J. concurring in part and dissenting in part). Both opinions openly acknowledged that this was one of "first impression" for Federal courts, Elledge, 823 F.2d, Supra, at 1453, 1454 (Edmondson, C.J. concurring in part, dissenting in part), with "no definitive answer." Elledge, at 1450; Elledge, at 1455, n. 6 (Edmondson, C.J. concurring in part, dissenting in part). Because the presumption of innocence is non-existent at a criminal defendant's sentencing, upon plea and conviction of the most heinous crime that can be committed against society, and was not correctly distinguished at all by the Eleventh Circuit panel majority, from trial circumstances, this Court must accept jurisdiction, to resolve this issue.

The Eleventh Circuit majority, and dissent, clearly acknowledged a distinction between prior State and Federal decisions, involving the effect of restraints on a defendant, during a determination of guilt or innocence, and the factual scenario of a post-conviction capital sentencing proceeding. Elledge, at 1450; Elledge, at 1452-1455 (Edmondson, C.J., concurring in part, dissenting in part). Nevertheless, the majority completely equated these vastly different circumstances. Elledge, at 1451. This approach completely ignores the effect of the absence of any presumption of innocence that an already-convicted murderer possesses, which is clearly a defendant's paramount interest in being free of physical restraints. Holbrook; Allen; Hack; Zygadlo. The clear absence of any inherent prejudice to a convicted felon, under these circumstances,

has been correctly analyzed, to result in affirmance of State criminal convictions, by approximately one-third of the entire Eleventh Circuit panel, and several state courts of last resort, (including the Florida Supreme Court, in this case), involving this Federal question. Elledge, at 1452-1457 (Edmondson, C.J, concurring in part and dissenting in part); Elledge v. Dugger, 833 F.2d 250, 250-252 (11th Cir. 1987) (denial of rehearing en banc) (Fay, C.J; Hill, C.J; Tjoflat, C.J; Edmondson, C.J, dissenting opinion); Marquez v. State, 725 S.W.2d 217, 227, 230 (Tex Cr App 1987), cert. denied, 108 S.Ct. 201 (1987); Bowers v. Maryland, 507 A.2d 1072, 1077-1081 (Md. 1986) cert. denied, 93 L.Ed.2d 395 (1986); Elledge v. State, 408 S.2d 1021, 1022 (Fla. 1981) cert. denied, 459 U.S. 981 (1982) (Elledge's status as a "confessed murderer of three persons", differentiates him from

those restrained at trials, regarding rights to fair trial, presumption of innocence).⁴ Thus, the dispute over resolution of this crucial Federal question, completely novel to this Court's prior jurisprudence, and the existence of substantial State and Federal authority contrary to the Eleventh Circuit's panel majority, mandate acceptance of certiorari, to settle this controversy. Rules 17.1 (a), (c), Rules of the Supreme Court.

This Court has said that the determination of whether a particular security arrangement, is prejudicial to a

⁴This Court's denial of certiorari relief, in all 3 of these state court decisions, where the issue of the shackling of already-convicted murderers at sentencing was raised, significantly left intact Florida, Maryland and Texas results, on the same Federal question, which stand in stark and direct contrast to the opinion under review here. Rule 17.1(a), (b), (c), Rules of the Supreme Court.

defendant's rights to a fair trial, depends on ". . . reason, principle, and common human experience". Holbrook, 89 L.Ed.2d, at 535; Estelle v. Williams, 425 U.S., Supra at 504. It is readily apparent that the panel majority in Elledge ignored or misinterpreted this analysis. Clearly, the State's interest, in protecting courtroom personnel and participants from a defendant, freshly convicted of first-degree murder, is greater than in a guilt-innocence phase context. Fountain, 768 F.2d, Supra, at 794; Harrell, 672 F.2d, Supra, at 637 (courtroom may be ideal setting for convicted felon to act upon threats of violence). Combined with the aforementioned non-existent interest of the defendant, at sentencing, in his presumed innocence, this Court's prior balancing of interests between the State and defendant does not encompass this brand new

equation. This conclusion further substantiates the position, that this Court has not, and must now address this Federal question, in this "unsettled" context. Rule 17.1 (c), Supra.

In the exercise of common sense, the jurors could not have been inherently prejudiced against Respondent, when they knew, from the outset of his sentencing proceeding, that he was a convicted murderer. An appropriate analogy exists, as Judge Edmondson observed in his dissent, with the Federal decisions involving prison inmates who were shackled or in prison clothes, while testifying or being tried at criminal trials. Wilson v. McCarthy, 770 F.2d at 1483, 1485 (no prejudice since jury knew from testimony that witness was inmate, member of prison gang, and that defendant on trial for prison assault, of fellow prisoner); Fountain, 768 F.2d, at

794 (no prejudice, since jury knew defendant and witnesses were prison inmates and guards, from criminal charges); Harrell, 672 F.2d, at 638 (same); United States ex rel Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir. 1973) (no prejudice, from defendant testifying in prison clothes, since jury knew defendant was on trial, for the murder of a fellow prison inmate;) Kennedy v. Cardwell, 487 F.2d 108, 111 (6th Cir. 1973) (no prejudice, since was "inevitable" that testimony at trial would reveal defendant's prior escapes from prison); see also, e.g., State v. Williams, 485 A.2d 570, 575 (Conn 1985) (jury knew, from charges of possession of weapon in prison, that defendant was prison inmate). These cases are particularly apt to Respondent's proceedings, where the jury was informed, by jury instructions, argument and testimony, (in part stipulated to and elicited

from Respondent himself), that Respondent had confessed and plead guilty to murdering three people, in different locations, in less than two days. The jury additionally heard of Elledge's threats of harm, while robbing the Nelson family, by his boasting of having "already killed two people this week". (ST, 278, 296). The Florida Supreme Court characterized Elledge, based on the circumstances of his murders of Margaret Strack, Edward Gaffney, and Kenneth Nelson, as "an avowed dangerous individual [who] through his confessed acts had proven himself a man of his word when violence was threatened" Elledge v. State, 408 S.2d, Supra, at 1023. (emphasis added). As alluded to by Judge Edmondson, in his dissent, the shackling of such a person might actually have worked to Elledge's advantage, by showing the State's ability to completely

control his conduct, thus making the death penalty "unnecessary". Elledge, at 1455, n. 6 (Edmondson, C.J, concurring in part, dissenting in part). Respondent's clearly dangerous and violent nature, and his status as a convicted killer, conveyed to the jury by proper evidence and argument, regardless of any such arguable impact of his shackles, defeats any application of inherent prejudice to Respondent's circumstances. Elledge, at 1454-1456 (Edmondson, C.J., concurring and dissenting in part). The jury, under "common human experience", would reasonably have expected that Respondent, as a convicted murderer, would be "controlled" in some manner, for the protection of everyone in the courtroom. Id. Under these circumstances, there was no inherent or actual prejudice to Respondent. This perspective, again demonstrates the error by the Eleventh

Circuit, in failing to distinguish between trial and sentencing restraints in any way, and the need for this Court to resolve this issue.

The importance of this Federal question is further evidenced by the unquestionable conclusion that this issue has and will continue to arise more frequently, in both capital and non-capital sentencing contexts. This is especially foreseeable in capital cases, given the obvious and legitimate safety concerns presented by threats to courtroom personnel, similar to those made by Respondent. (ST, 10, 11); see, e.g., Marquez, 725 S.W.2d, Supra, at 228 (attacks by defendant of other inmates, threats of harm against prosecutor; threats to escape, prior possession of deadly weapon, in jail, formed stated basis for shackling at capital sentencing); Bowers, 507 A.2d, supra, at 1073-1075 (incidents of

assault on prison guard, while jailed, necessitating transfer to other prison, formed basis for shackling). These factual circumstances are clearly capable of repetition at other future State sentencing proceedings, and on Federal collateral review, requiring the immediate binding and uniform resolution of this issue, by this Court.

The Eleventh Circuit's majority decision, extending this Court's precedent to a clearly inapplicable and distinguishable set of facts, has effectively undermined the underlying principles of this Court, governing the use of physical restraints on a defendant. This Court's prior decisions, clearly did not directly address the propriety of shackling, as the sole restraint, at a defendant's capital sentencing. Holbrook; Estelle; Allen. The

Eleventh Circuit's treatment of convicted murderer-felons in this context, on an exactly equal footing with unconvicted individuals, presumed innocent while standing trial, undermines and "chills" the exercise of discretion by state trial judges, to provide for security and control of their sentencing proceedings. This Court should exercise jurisdiction, in order to address this issue as a matter of first impression, and to correct the Eleventh Circuit panel majority's erroneous reasoning and unwarranted extension of Sixth and Fourteenth Amendment rights to Respondent. The lack of any inherent or actual prejudice to Respondent, by virtue of being shackled at his sentencing, requires reversal of the opinion under review.

II.

ELEVENTH CIRCUIT INCORRECTLY INTERPRETED RESPONDENT'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS, SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF STATE TRIAL COURT, ON IMPOSITION OF SHACKLING ALREADY-CONVICTED FELON AT SENTENCING, AND IMPOSING REQUIREMENT THAT STATE TRIAL COURT CONDUCT SUA SPONTE INQUIRY BEFORE ORDERING SUCH SHACKLING.

In Holbrook v. Flynn, supra, this Court expressly limited the role of a Federal court, in reviewing a collateral challenge to a state court's imposing of restraints on a criminal defendant. Such decisions were not to be based on a Federal court panel's independent judgment of the "preferred" security arrangement. Holbrook, 89 L.Ed.2d, at 536-537. This Court stressed that a Federal court's sole function was to "determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to

defendant's right to a fair trial." Id. This standard of review reflects the fact that trial courts are best left with discretion, in determining the most appropriate security measures, since they are in the best position to evaluate the necessary extent of such measures, to prevent harm to others from a defendant. Hack, 782 F.2d, Supra at 867; United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970). Because of these circumstances, and the uniquely factual foundations for a state trial court's determination on these matters, that are peculiarly within its province to decide, such a determination is entitled to extreme deference. Elledge, at 1456 (Edmondson, C.J, concurring in part, dissenting in part); Elledge, 833 F.2d supra, at 251 (on petition for rehearing and petition for rehearing en banc) (Fay, C.J; Tjoflat, C.J; Hill, C.J;

Edmondson, C.J., dissenting); Holbrook,
supra; Witt v. Wainwright, 469 U.S. 412,
427-429 (1984); Patton v. Yount, 467 U.S.
1025, 1038 (1984). Thus, in the event that
this Court decides that prior case law can
be applied to Elledge's circumstances,
solely on the Eleventh Circuit's scope of
review, and obligation to hold a sua sponte
pre-shackling inquiry, this Court must
correct the Eleventh Circuit's approach and
result.

It is apparent that the Eleventh
Circuit panel "second-guessed" the state
trial court's exercise of such discretion,
and criticized his failure to take certain
action, even in the face of no request for
such action by Respondent. Elledge, at
1451, 1452 (A; 55-59). The opinion
consists of conclusions by the majority,
that the state trial court "should have
allowed" Respondent to speak with counsel,

so as to create the speculative possibility that Respondent then "... could have possibly made a more specific argument against shackling". Elledge, at 1451-1452. The majority additionally faulted the state trial judge, for failing to consider other alternatives to shackling, conduct a jury poll, or give a cautionary instruction. Elledge at 1451-1452. However, the Eleventh Circuit majority did not discuss or rely upon the Record of what the state trial court did do, so as to conduct the limited scope of Federal review, mandated in Holbrook. The opinion does not engage in any such analysis, except to speculate about what might have occurred, had the trial judge taken the "better" course of action, sua sponte. Elledge, at 1451-1452.

This analysis is directly and apparently inconsistent with the proper scope of

review of such ruling, expressed in Holbrook and other Federal decisions, that a Federal court's independent view of the "better course of action" is an irrelevant and inappropriate criterion. Holbrook; Wilson v. McCarthy, Supra; Elledge, at 1456 (Edmondson, C J, concurring in part, dissenting in part); Elledge, 833 F.2d, at 150-151 (on petitions for rehearing and rehearing en banc) (Fay, C.J; Tjoflat, C.J; Hill, C.J; Edmondson, C.J, dissenting). The Eleventh Circuit panel majority's substitution of its own judgment, for that of the State trial court, demonstrates readily apparent conflict with this Court's precedent. Holbrook, Supra. The majority's failure to defer to the state trial court's factual findings, is further at odds with prior rulings of this Court, Witt, Supra; Patton, Supra; and other Federal courts which have deferred to the

state trial court's exercise of discretion. Allen, 397 U.S., at 345-346; Wilson v. McCarthy, 770 F.2d, Supra, at 1484; Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982); Harrell, 672 F.2d, at 635-636; United States v. Theriault, 531 F.2d, at 284; Kennedy v. Cardwell, 487 F.2d 101, 107, 110 (6th Cir. 1973); cert. denied, 416 U.S. 959 (1974).

The Eleventh Circuit's exercise of authority, in excess of the proper scope of collateral review on such an issue, and in a manner directly and apparently inconsistent with this Court's precedent, requires the immediate resolution of this Court. Rule 17.1(c), Rules of the Supreme Court. Jurisdiction is further appropriate, to resolve the intercircuit conflict created by the Eleventh Circuit's action, Rule 17.1 (a), Supra, and to rectify the Eleventh Circuit's unwarranted

departure from governing rules of law established by this Court. Rule 17.1(a).

It is apparent from the Record, see Statement of the Case, Supra, that in the face of the imposition of shackling upon him at sentencing, Respondent did not challenge, attack or otherwise question the existence or impact of such restraints, beyond a very general objection.⁵ (ST, 10,11). Respondent never challenged, by offer or proffer of evidence, statements or arguments, the stated factual basis, justifying Elledge's shackling at sentencing. (ST, 1-401). Counsel did not request a hearing on the matter, request

⁵ The Elledge majority and dissent did not view or characterize Respondent's request to "say something", declined by the state trial judge, (ST, 11), as a request for a hearing on the matter. Elledge, at 1451-1452 Elledge, at 1453, n. 1 (Edmondson, C.J., concurring and dissenting in part).

any form of jury polling, or request any type of jury instruction, that sought to explore or determine the impact or consequences of Respondent's shackling upon the jury. However, the Eleventh Circuit's panel majority effectively concluded that the state trial court had erred by not providing Respondent with a chance to challenge the basis for his shackling, not conducting any inquiry, into possible less restrictive alternatives to shackling; not polling the jury, to determine the extent of prejudice, if any by the fact of Respondent's shackles; and not providing a "cautionary" instruction. Elledge, at 1451-1452. This decision is in such direct and express conflict, with sister Courts of Appeal, on the same subject, that the case appropriately invokes certiorari jurisdiction by this Court, to resolve this conflict.

Several other Circuits, in analyzing the same matter, have concluded that a failure to challenge or otherwise request some form of inquiry, instructions, or polling on the impact and consequences of physically restricting a defendant, does not obligate the state trial judge to conduct such proceedings on his own. The Fifth Circuit has held that, in the absence of any objections, or requests for relief, or challenge of the stated basis for restraints, any possible violation of his Constitutional rights is waived, and that the trial judge need not conduct a hearing or take other action, besides justifying his imposition of restraints in the Record. United States v. Diecidue, 603 F.2d 535, 549-550 (5th Cir. 1974); Wright v. Texas, 533 F.2d 185, m 187 (5th Cir. 1976); United States v. Theriault, 531 F.2d, Supra, at 285. These panel decisions

have explicitly conditioned the need for a pre-restraint hearing, on the prerequisite that a criminal defendant affirmatively challenge the factual basis relied upon for such restraints. Id.; see also United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970). The Eleventh Circuit's decision, in nevertheless mandating that such a hearing be held, without any such affirmative action then, or since, by Respondent, clearly creates a division between these Circuits, on this important Federal question. Rule 17.1(a), Supra.

The Second Circuit Court of Appeals, in United States v. Taylor, 562 F.2d 1345 (2nd Cir. 1977), specifically ruled that in the absence of a request by the defendant for voir dire or polling of the jury, regarding the effect of the jurors' viewing of the defendant in manacles, no error could be attributed to the State trial court, for

not conducting such voir dire on its own. Taylor, 562 F.2d, supra, at 1359. The Second Circuit panel further noted that such a sua sponte voir dire procedure, may well have inappropriately made jurors more conscious of the defendant's custodial status. Taylor, at 1359-1360. The Eleventh Circuit's approach, clearly creates direct conflict with Taylor, as well.

More recently, in Wilson v. McCarthy, 770 F.2d 1482 (9th Cir. 1985), a panel of the Ninth Circuit, even though observing that a state trial court might have been "better served" by giving a cautionary instruction, as to the possible prejudicial impact of a shackled witness, declined to assign error to the trial court for not giving a sua sponte instruction. Wilson, 770 F.2d, Supra, at 1485; 1485, n. 3. The Court further concluded that, in the

absence of any defense request or showing that alternatives less restrictive than shackling, would serve legitimate security interests, there was no error by the State trial court, in failing to consider such alternatives. Wilson, at 1486.

This argument is substantiated by the fact that Elledge represents such a departure from governing legal precedent, within the Eleventh Circuit itself.

Significantly, even in prior cases within the same Circuit, other panels have refused to attribute error to a state trial judge who does not hold a hearing or examine less restrictive alternatives to shackling, when none are requested by a defendant. Allen

v. Montgomery, 728 F.2d 1409, 1413, n. 4 (11th Cir. 1986); Zygadlo v. Wainwright, 720 F.2d 1221, 1224 (11th Cir. 1983).

Significantly, Circuit Judges Hill and Tjoflat, who were each part of the

unanimous panels in Allen, supra, and Zygadlo, supra, joined as dissenters from the denial of rehearing en banc in Elledge. Elledge, 833 F.2d, at 250.

Thus, the clear conflict on this crucial issue, between the Eleventh Circuit in Elledge, and those aforementioned opinions of the Second, Fourth, Fifth and Ninth Circuits, requires immediate resolution by this Court, in the proper exercise of its certiorari jurisdiction.

CONCLUSION

Petitioners have attempted to present several substantial reasons, upon which to conclude that the crucial Federal question of inherent and/or actual prejudice, from shackling an already-convicted defendant at a capital sentencing proceeding, has not and should be addressed by this Court. There are substantial bases for this Court's exercise of jurisdiction in this case, including several examples of conflict between the opinion under review, and past opinions of this Court, sister Federal Courts of Appeals, and state courts of last resort. Rule 17.1(a),(c). Based on the foregoing, Petitioners respectfully request that this Court GRANT the petition for writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-5120

WILLIAM DUANE ELLEDGE,

Petitioner-Appellant.

VERSUS

APPENDIX

RICHARD L.

Respondent-Appellee.

Appeal from the
United States District Court for the
Southern District of Florida

(July 20, 1987)

Before ROWEY, HATCHETT and EDMONDSON,
Circuit Judges.

PER CURIAM:

Defendant-petitioner William Duane
Elledge appeals a district court order
denying him federal habeas corpus re-

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-5120

WILLIAM DUANE ELLEDGE,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,

Respondent-Appellee.

Appeal from the
United States District Court for the
Southern District of Florida

(July 20, 1987)

Before RONEY, HATCHETT and EDMONDSON,
Circuit Judges.

PER CURIAM:

Defendant-petitioner William Duane Elledge appeals a district court order denying him federal habeas corpus re-

lief; he raises six bases for relief. Because we find that Elledge has shown that his constitutional rights were violated in one respect, we vacate the district court's judgment and remand with instructions.

Elledge was involved in three killings that occurred in a 36 hour period in August, 1974,² although only the first murder -- of Margaret Anne Strack -- is at issue on appeal. Strack was raped and killed in Hollywood, Florida, on August 24, 1974; the two subsequent murders occurred in Jacksonville, Florida. Early in the morning of August 26, Jacksonville police arrested Elledge for the third homicide. He then was interrogated four times between 4:30 a.m.

² The facts and details of this crime spree are set forth in Elledge v. State, 346 So.2d 998 (Fla. 1977).

and 10:30 a.m. that morning; the police properly informed Elledge of his rights on each occasion. See generally Miranda v. Arizona, 384 U.S. 436, 86 S. Ct 1602, 16 L.Ed.2d 694 (1966). During the course of their questioning and investigation, the Jacksonville police determined that Elledge was a suspect in the Strack homicide and questioned him about it as well. At the last interrogation, Elledge orally confessed to all three murders. The next day he again confessed to the Strack murder after follow-up interrogation by Hollywood police investigators; this confession was tape recorded.

Elledge's public defender adopted the following strategy: (1) plead insanity if possible; (2) if that defense was not available, suppress the

confession and plead not guilty; and
(3) if the confession could not be suppressed, plead guilty and seek mercy. The insanity defense proved fruitless when psychiatrists found Elledge to be sane; efforts to suppress the confessions on the grounds that Elledge was physically coerced because he confessed without sleep or food and was still under the influence of drugs and alcohol also failed. Under advice of counsel, Elledge then entered a plea of guilty, leaving sentencing as the sole issue to be determined.

Although a sentence of death was entered after the first sentencing hearing (in 1975), the Florida Supreme Court overturned that sentence and remanded the case for a new sentencing hearing. Elledge v. State, 346 So.2d 998 (Fla.

1977)). The same state trial judge presided over the second sentencing hearing; he appointed the same attorney, who by this time was in private practice, to represent Elledge. This second sentencing hearing, held in 1977, is the sentencing hearing referred to in the balance of this opinion.

Elledge's taped confession was played at the sentencing hearing; additionally, a variety of witnesses testified. Defendant took the stand in his own behalf and detailed his harsh childhood and early addiction to and abuse of alcohol and drugs. A jury considered the evidence and recommended death; the judge agreed and, thus, entered a sentence of death. A series of unsuccessful state appeals followed.³ After ex-

³ The Florida Supreme Court affirmed

hausting all state remedies, Elledge filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Florida. That court held an evidentiary hearing and concluded that, while counsel's performance at the sentencing hearing was inadequate, no prejudice resulted from counsel's unreasonable performance. The district court then denied the petition, and this appeal followed.

Elledge makes these contentions on appeal: (a) counsel's performance in challenging the confession was inadequate and prejudiced Elledge; (b) the

Elledge's death sentence. *Elledge v. State*, 408 So.2d 1021 (Fla. 1981), cert. denied, 459 U.S. 981 (1982). Elledge then sought and was denied collateral relief pursuant to Fla.R.Crim.P. Sec. 850. The Florida Supreme Court affirmed. *Elledge v. Graham*, 432 So.2d 35 (Fla.), cert. denied, 464 U.S. 986 (1983).

district court's conclusion that no prejudice arose from counsel's inadequate representation at the sentencing phase was erroneous because the court failed to consider that the evidence not adduced would have altered the entire evidentiary picture: (c) Elledge did not receive an individualized capital sentencing determination because the trial judge refused to consider any nonstatutory factors that mitigated against imposing the death penalty; (d) the death penalty was applied mechanistically under Florida's felony murder rule without regard for whether Elledge intended that a life would be taken; (e) the death penalty is applied in an arbitrary and discriminatory manner in Florida as evidenced by empirical studies that indicate a disproportionality in

death sentences based on the race and/or sex of the victim; and (f) the district court's decision to shackle Elledge at the sentencing hearing was inherently prejudicial.

1. Effectiveness of Representation in Seeking to Suppress the Confessions.

As a threshold matter, effective assistance of counsel is a two-prong issue. The petitioner must establish both that counsel's performance was not reasonably adequate and that petitioner was prejudiced by that unreasonable performance to the point that he did not receive a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Elledge's basic claim is that his counsel was ineffective because he failed to

use the proper theory in challenging the confessions. The two confessions require different analytic frameworks; therefore, we will discuss each separately.

A. The first, untaped confession

Elledge's counsel sought to suppress the first confession, arguing that it was involuntary because it was physically coerced. Counsel maintained that Elledge had no sleep the night of his arrest and interrogation, had no food and drink during his interrogation, confessed while hung over and under the residual impact of drugs and alcohol, and was in a general "daze" at the time of his confession.⁴ Counsel did not argue,

⁴ Elledge maintains that this daze was the result of three people dying in such

however, that Elledge's fifth amendment rights were violated when the police repeatedly reinterrogated and rewarned him of his Miranda rights despite Elledge's alleged invocation of his right to silence. This omission was unreasonable representation according to Elledge. We disagree.

The test for the performance prong of Strickland is objective "reasonableness under prevailing professional norms." Id. at 688, 104 S.Ct at 2065, 80 L.Ed.2d at 694. A reviewing court conducting such an examination must view the performance at the time it occurred, avoid the "distorting effects of hindsight," id., and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct at the time." Id. at 694.

fessional assistance ...". Id. at 689, 104 S.Ct at 2066, 80 L.Ed.2d at 694.

Until Michigan v. Mosley, 423 U.S. 96, 102-04, 96 S.Ct 321, 326, 46 L.Ed.2d 313, 320-22 (Dec. 9, 1975), repeated re-interrogation in conjunction with repeated Miranda warnings was not recognized as a potentially coercive technique. Elledge's counsel sought to suppress the first confession in March, 1975; obviously, he did not have the benefit of Mosley at that time. Furthermore, as of March, 1975, no Florida courts had held that such procedures were coercive. Reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop. See Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir.), af-

firmed, 104 S.Ct 450, 78 L.Ed.2d 266 (1983) (per curiam). Thus, Elledge's claim fails on the first, performance prong of Strickland.

B. The second, taped confession

Even if we assume, arguendo, that counsel's performance was unreasonable because he did not attack the police's alleged failure to honor Elledge's invocation of his right to remain silent,⁵ we find that no prejudice attached as a result, because the second confession was admissible -- under either of two alternative grounds -- even if the first confession was not.

⁵ Elledge now contends that the police repeatedly reinterrogated him -- albeit after warning him of his Miranda rights on each occasion -- after only short periods of time had passed.

A confession that follows on the heels of an involuntary confession may be tainted thereby and thus inadmissible. Martin v. Wainwright, 770 F.2d 918, 928 (11th Cir. 1985), modified on other grounds, 781 F.2d 185 (11th Cir. 1986). The taint transfers, however, only if the first confession was inadmissible as involuntary, i.e., coerced and not the product of a free will. See Oregon v. Elstad, 105 S.Ct 1285, 1294, 84 L.Ed.2d 222, 231 (1985); Martin, 770 F.2d at 928. This circuit has held that not honoring a request to stop questioning is no different from failing to give the Miranda warning in the first place; while both are "technical" violations of Miranda, neither violates the fifth amendment. Martin, 770 F.2d at 928-29 (relying on Elstad, 105 S.Ct at 1293,

84 L.Ed.2d at 231). Thus, confessions obtained by such violations, while inadmissible because they run afoul of Miranda's per se bar, are not "involuntary"⁶ and do not taint any subsequent confessions. Id. Therefore, the second, taped confession was not made inadmissible even if the first confession resulted from technical Miranda violations.

Furthermore, even if the first confession was both violative of Miranda and involuntary, Elledge cannot prove he was prejudiced by admission of the second confession because it was sufficiently distinct from the first confes-

⁶ Whether a statement is "voluntary" requires application of pre-Miranda due process voluntariness analysis. Martin, 770 F.2d at 928. That is, the court must look at all the circumstances to determine whether the confession was made of the accused's free will. Id. at 925.

sion and, therefore, admissible. See
Elstad, 105 S.Ct at 1294, 84 L.Ed.2d at
 232-33 (dicta). When an earlier confes-
 sion has been coerced and, thus, was in-
 voluntary, a court seeking to determine
 whether a subsequent confession is
 tainted thereby must look to "the time
 that passes between confessions, the
 change in place of interrogations, and
 the change in identity of the interroga-
 tors." Id.; see Holleman v. Duckworth,
 700 F.2d 391, 396 (7th Cir. 1983);
United States v. Gresham, 585 F.2d 103,
 108 (5th Cir. 1978).⁷

In Elledge's case, a full day had
 passed between the confessions; he had
 slept and eaten; new interrogators

⁷ In Bonner v. City of Prichard, 661 F.
 2d 1206 (11th Cir. 1981) (en banc), this
 court adopted as precedent all decisions
 of the former Fifth Circuit Court of Ap-
 peals decided prior to October 1, 1981.

were employed (although his original interrogator was present for part of the new questioning); and the interrogation occurred in entirely different and comfortable surroundings. Additionally, his inquisitors did not use the first confession as leverage to coerce the second. See Graham, 585 F.2d at 108.

Consequently, if counsel had succeeded in suppressing the first confession by means of a Mosley-type attack, the second confession nevertheless would have been admissible. Therefore, even were we to assume that counsel's failure to adopt such a strategy rendered his performance unreasonable, Elledge cannot demonstrate that any prejudice inhered as a result. Counsel's performance thus was not ineffective under Strickland.

II. Effectiveness of Representation at the Sentencing Hearing⁸

The district court held an evidentiary hearing and concluded that Elledge's counsel rendered unreasonable assistance at the sentencing phase because he failed to investigate and to present a psychiatric mitigating defense based on his client's mental deficiencies, abject childhood and history of drug and alcohol abuse. That court nevertheless determined that counsel was not ineffective because the failure did not prejudice Elledge: he would have received the same sentence even had such evidence been adduced. See Strickland, 466 U.S. at 695, 104 S.Ct at 2069, 80 L. Ed.2d at 698. Because these conclusions

⁸ The district court considered this to be Elledge's sole claim with "arguable" merit.

are subject to plenary review by this court,⁹ id. at 698, 104 S.Ct at 2070, 80 L.Ed.2d at 700, we shall discuss each separately.

A. Performance

As discussed earlier, the first prong in an ineffective assistance claim is whether counsel's performance was professionally unreasonable. A reviewing court, however, must be highly deferential in scrutinizing counsel's performance; the tendency and temptation to second-guess is high and must be avoided. Strickland, 466 U.S. at 689, 104 S.Ct at 2065, 80 L.Ed.2d at 694.

⁹ The underlying factual findings of the district court are presumptively correct unless clearly erroneous, and the factual findings of the state court are subject to the 28 U.S.C. Sec. 2254 (d) presumption of correctness. Id.

Thus, we look to the particular facts of the case and determine whether the acts or omissions were "outside the wide range of professionally competent assistance" to the extent that the errors caused the "adversarial testing process" not to work. Id. at 690, 104 S.Ct at 2066, 80 L.Ed.2d at 695.

In this case, the claim is that counsel failed to investigate Elledge's past.¹⁰ Specifically, the district

¹⁰ Strickland requires only that counsel conduct a reasonable investigation or make a reasonable decision not to investigate. Strickland, 466 U.S. at 691, 104 S.Ct at 1066. Establishing what a reasonable investigation would have entailed often will be pivotal. Testimony from lawyers normally will be necessary to establish what the reasonable level and quality of investigation would be. In some extreme cases, such as where no investigation occurred, a judge can conclude, even in the absence of expert testimony, that the investigation -- or lack thereof -- was deficient. We devote little attention to this first step, in this case, because the court correctly concluded that, under these

court found that counsel made no effort either to locate an expert psychiatric witness or to put on background character testimony from family members in mitigation.¹¹ This factual determina-

circumstances, some investigation was required.

¹¹ Elledge's counsel's performance was not inadequate, according to the state, since counsel was aware that an unbroken trail of psychiatric evaluation unanimously had not found Elledge to suffer from an organic brain dysfunction. Given this diagnostic history, the State claims it was a reasonable decision to conduct no investigation. Were these the sole facts presented we might agree; but other relevant facts require a different conclusion.

Elledge's counsel was convinced in 1975 that Elledge was "crazy"; he continued to hold that conviction in 1977 (i.e., prior to the second sentencing hearing) despite two court-ordered psychiatric evaluations to the contrary. Counsel then discovered, in talking with Elledge, that prison authorities had been treating Elledge with Mellaril and Dilantin while he was incarcerated pending the 1977 sentencing hearing. Mellaril is an antipsychotic medication and Dilantin is an antiepileptic medication. Despite this new information,

tion is not clearly erroneous.¹² See

which supported his already held conviction that his client was "crazy," counsel did not seek new expert advice. Counsel's failure to pursue the issue, once its viability was renewed, was inadequate professional performance.

12 When a defendant informs counsel that "certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Strickland, 466 U.S. v. 691, 104 S.Ct at 1066. The record is not completely clear whether Elledge's counsel ever asked his client about possible testimony by family members. All indications, however, are that no such questioning occurred. Elledge did eventually imply that he did not feel his family would be particularly interested. Although the record is somewhat opaque, we feel the district court was not clearly wrong in deciding that counsel was aware that family members existed who could corroborate, and perhaps expand on, Elledge's testimony. The court also was not clearly erroneous in concluding that Elledge had not dissuaded counsel from undertaking an investigation to determine the willingness of such family members to testify. We note that Elledge's brother and sister stated that had they been approached in 1977 they would have testified.

id. at 698, 104 S.Ct at 2070, 80 L.Ed.2d at 700. As the court noted, "counsel presented a psychiatric defense without a psychiatrist," relying instead solely on Elledge's "free-form" testimony about his background and mental impairments.

We accept the district court's view that counsel's failure at least to interrogate Elledge's relatives and to seek an expert witness was outside the range of competent assistance. See Tyler v. Kemp, 755 F.2d 741, 744-45 (11th Cir. 1985), cert. denied sub nom. James v. Tyler, 106 S.Ct 582 (1985), overruled in part (on other grounds), Peek v. Kemp, 784 F.2d 1479, 1494 n. 15 (11th Cir. 1986); King v. Strickland, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 105 S.Ct 2020 (1985). An attorney has a duty to undertake reason-

able investigation or "to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct at 2066, 80 L. Ed.2d at 695. Elledge made his counsel aware of his unhappy and abused past; yet counsel did not even interrogate Elledge's family members to ascertain the veracity of the account or their willingness to testify. He also did not seek out potentially helpful expert witnesses.

Briefly stated, counsel's total failure to investigate possible witnesses, both expert and lay, when he was aware of Elledge's past and knew that mitigation was his client's sole defense, was unprofessional performance.

B. Prejudice

1. Whether a favorable psychiatrist could have been found with reasonable diligence.

The district court stated that "counsel for the respondent conceded that a psychiatrist such as Dr. Dorothy Lewis, who testified in Mr. Elledge's defense during the evidentiary hearing before this Court, could have been located in 1977 to testify during the sentencing proceeding" ¹³ This led

¹³ Dr. Dorothy Lewis testified in Elledge's defense at the federal habeas hearing. She found that he suffered from organic brain dysfunction, episodic rages and paranoid behavior. She also stated that in her opinion Elledge became especially violent when he felt he was teased, tricked or in danger. Her conclusion was that the combination of organic brain dysfunction, psychotic paranoia and childhood abuse caused a disorder that affected Elledge during the Strack homicide.

the court to conclude that counsel's performance fell below the standard set out in Tyler v. Kemp, 755 F.2d 741, 744-45 (11th Cir. 1985).¹⁴ The court went on to conclude, however, that even had counsel produced such a witness the death sentence nevertheless would have been imposed. Consequently, Elledge was not prejudiced; counsel was not ineffective under Strickland; and the sixth amendment was not violated.

Although the district court's conclusion that the sixth amendment had not been violated is correct, the analytic framework the court used to determine that a favorable witness could have been located was inaccurate. The record re-

¹⁴ The court also found that the failure to present the witnesses was not a decision of trial strategy. See Thomas v. Wainwright, 767 F.2d 738, 744 (11th Cir. 1985), cert. denied, 106 S.Ct 1241 (1986).

veals that the State's counsel merely acknowledged that Dr. Lewis was extant in 1977 and had formulated her clinical theories at that time. The State never conceded that a reasonably diligent investigation would have uncovered either Dr. Lewis or a similar expert who would have testified favorably at Elledge's sentencing.

Specifically, the district court concluded that, in 1977, counsel "could have located" Dr. Lewis. The test, however, is not simply whether counsel "could have located" a witness similar to the one eventually produced. Instead, the court must determine whether it is reasonably likely that a reasonable attorney, operating under the circumstances of the case and acting in a reasonably professional manner, would have

located such a witness.

In other words, Strickland requires only that counsel conduct a reasonable investigation. Strickland, 466 U.S. at 691, 104 S.Ct at 1066. To prove that he was prejudiced by counsel's failure to investigate and to produce a certain type of expert witness, a habeas peti-

15 In making this determination, the court must look to what constitutes a reasonable effort; i.e., what a competent attorney would have done given the constraints of time and money under the facts of the case. Merely producing Dr. Lewis, several years later, is of no moment. We note that Dr. Lewis was practicing psychiatry in New Haven, Connecticut in 1977; it strikes us as extremely doubtful that Elledge's counsel would have discovered Dr. Lewis in 1977 with a reasonably diligent investigation. We also note that Dr. Lewis neither testified that she would have come to Florida to testify in 1977 nor that she knew of anyone in Florida who shared her views at that time. We make no comment on whether a similar expert was reasonably discoverable -- we merely hold that the record before us reveals no evidence demonstrating such a likelihood.

tioner must demonstrate a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced. If such a result was not reasonably probable, the petitioner was not prejudiced by counsel's failure to investigate. Merely proving that someone -- years later -- located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort.¹⁶

¹⁶ Simply put, the Strickland test requires a habeas petitioner in Elledge's position to show: (a) that it was professionally unreasonable for counsel not

In deciding whether a petitioner has met his burden a court must look to all the circumstances of the case and consider all the evidence presented.¹⁷

to investigate; (b) what kind of, and how much, investigation an ordinary, reasonable lawyer would have undertaken; (c) that it is reasonably probable that a reasonable investigation would have turned up an expert who would have presented testimony similar to that which was eventually adduced; and (d) that it is reasonably probable that this testimony would have affected the sentence eventually imposed. Failure to meet any of these steps defeats the ineffective-ness claim.

¹⁷ We stress that a reviewing court need not address each aspect of the Strickland analysis before concluding that counsel was not ineffective. Strickland, 466 U.S. at 697, 104 S.Ct at 2069-70. Once the court determines that a habeas petitioner cannot meet any one of the various steps, the court need go no further. Id. For example, a district court may simply elect not to address whether an expert was reasonably available and instead conclude that counsel was not ineffective because no prejudice inhered in that such testimony would not have affected the ultimate sentence imposed.

In this case, however, the district court addressed the "availability" is-

assault on prison guard, while jailed, necessitating transfer to other prison, formed basis for shackling). These factual circumstances are clearly capable of repetition at other future State sentencing proceedings, and on Federal collateral review, requiring the immediate binding and uniform resolution of this issue, by this Court.

The Eleventh Circuit's majority decision, extending this Court's precedent to a clearly inapplicable and distinguishable set of facts, has effectively undermined the underlying principles of this Court, governing the use of physical restraints on a defendant. This Court's prior decisions, clearly did not directly address the propriety of shackling, as the sole restraint, at a defendant's capital sentencing. Holbrook; Estelle; Allen. The

Elledge cannot demonstrate that he was prejudiced by counsel's failure to investigate his mental condition and produce a favorable expert witness.

2. Effect of the psychiatric and family testimony on the ultimate sentence.

Even if Elledge's counsel had produced Dr. Lewis and Elledge's family members at the sentencing phase, we

widely the proposed theory was accepted at the time the investigation occurred and the ease an attorney would have had in getting such experts, and (c) any other relevant testimony that would tend to demonstrate it was reasonably probable that reasonable diligence would uncover an expert similar to the one eventually located.

We emphasize that the duty is only to conduct a reasonable investigation. Counsel is not required to "shop" for a psychiatrist who will testify in a particular way. See Barfield v. Harris, 540 F.Supp. 451, 457-59 (E.D. N.C. 1982), affirmed, 719 F.2d 58 (4th Cir. 1983), cert. denied, 104 S.Ct 2401 (1984).

agree with the district court that Elledge was not prejudiced thereby: he nevertheless would have received the death penalty.

The value of Dr. Lewis' testimony was undercut in part by the revelation that her analysis largely relied on Elledge's recitations and had not been fully corroborated by independent follow-up investigation. In addition, the two court-appointed psychiatrists who examined Elledge each gave damaging evaluations that would have diluted Dr. Lewis' impact.¹⁹ Moreover, much of the testimony elicited from Elledge's brother and sister could be used against

¹⁹ Of all the several experts who examined Elledge over the years, only Dr. Lewis found him to be operating under extreme emotional or emotional disturbance caused by organic brain damage. The great weight of expert testimony clearly cut against Dr. Lewis' testimony and made it less persuasive.

him; e.g., their descriptions of his early violent temper, his sister's explanation of his alleged incestuous assault on her, his brother's description of Elledge as "a mean guy," and their emergence as normal citizens even though they had been subjected to similar abuse and neglect. The family testimony also was cumulative to a degree since Elledge had testified to many of the particulars in question.

As a final point, the aggravating circumstances of the case were substantial. It cannot be gainsaid that the cruelty of the rape and the murder made it more difficult for Elledge to alter the final sentence by adducing mitigating circumstances. It is proper for a reviewing court, in deciding whether the additional evidence would have altered

the eventual sentence, to consider the strength of the case presented against the defendant.²⁰ See Strickland, 466 U.S. at 696, 104 S.Ct at 2069, 80 L.Ed. 2d at 699 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.")

Elledge nevertheless maintains that if the psychiatric mitigating circumstances had been presented and if those circumstances had been credited by the

²⁰ We note and reject Elledge's claim that the district court misapplied Strickland when it stated that in light of the extreme aggravating circumstances of the Strack murder, "only the most convincing evidence in support of mitigating circumstances could create a reasonable probability . . . that the balance of mitigating circumstances did not warrant death." This argument places far too much emphasis on one sentence in a long order; the order, taken as a whole, makes clear that the court applied the proper standard.

judge and jury, the "entire evidentiary picture" would have been altered. See id. at 696, 104 S.Ct at 2069, 80 L.Ed.2d at 699. Psychiatric mitigating evidence has this potential because it may impact the casual relationship that can exist between mental illness and homicidal behavior. Thus, psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors. See Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977), cert. denied, 98 S.Ct 393 (1977).

This argument fails, however, because a careful reading of the district court's order shows that the court -- acting within its discretion as fact-finder -- gave little weight to the testimony of Dr. Lewis as well as that of Elledge's family members. The district

court simply found that no significant mitigating evidence was adduced. Further, when the court weighed the value of Dr. Lewis' testimony, it found that the aggravating factors outweighed those presented in mitigation. See, e.g., Mann v. State, 453 So.2d 784, 785 (Fla. 1984), cert. denied, 105 S.Ct 940 (1985); Adams v. State, 412 So.2d 850, 854, 857 (Fla. 1982) (three mitigating factors, including that the capital offense was committed while defendant was under the influence of extreme mental or emotional disturbance, outweighed by three aggravating circumstances), cert. denied, 106 S.Ct 1506 (1986). There is no indication that the district court applied anything other than the "reasonable probability" standard or failed to weigh the overall impact of the evidence

on the total evidentiary picture.

The foregoing discussion illustrates that Elledge has not demonstrated a reasonable probability that, if adduced at trial, the psychiatric and background evidence presented in his habeas proceeding would have caused the sentencer to conclude "that the balance of aggravating and mitigating circumstances did not warrant death."

Strickland, 466 U.S. at 695, 104 S.Ct at 2069, 80 L.Ed.2d at 698.

III. Consideration of Nonstatutory Mitigating Circumstances

Elledge asserts that he was denied the individualized sentencing determination demanded by the eighth amendment because the sentencing judge restricted his consideration solely to statutory

mitigating factors. See generally Lockett v. Ohio, 438 U.S. 586, 98 S.Ct 2954, 57 L.Ed.2d 973 (1978).

The confusion in Florida law concerning the consideration of nonstatutory mitigating circumstances -- confusion that lasted from 1972 to 1978 -- has been discussed at length by this court. Hitchcock v. Wainwright, 770 F. 2d 1514, 1516 (11th Cir. 1985)(en banc), rev'd sub nom. Hitchcock v. Dugger, 107 S.Ct 1821 (1987). The period of confusion, which was exacerbated by the decision in Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct 2200, 53 L.Ed.2d 239 (1977), finally was put to rest in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct 2185, 60 L.Ed.2d 1060 (1979), after the United

States Supreme Court decided in Lockett that the eighth and fourteenth amendments require the sentencer to consider all mitigating evidence. Hitchcock, 770 F.2d at 1516.

Elledge, who was sentenced after Cooper and before Songer, concedes that the trial court allowed him to introduce nonstatutory mitigating evidence; he also acknowledges that his attorney did not feel precluded from presenting such evidence. Elledge maintains, however, that the trial judge did not consider the nonstatutory evidence that was adduced and that the jury was improperly instructed to consider only the statutorily enumerated factors.

Recently, in Hitchcock v. Dugger, 107 S.Ct 1821, 95 L.Ed.2d 347 (1987), the Supreme Court overturned a Florida-

imposed death penalty, basing its decision on a somewhat similar Lockett claim. The sentencing proceedings in Hitchcock -- including the judge's instruction to the jury, the arguments to the jury, and the trial court's admission of evidence of nonstatutory mitigation -- resemble Elledge's proceedings. We nevertheless find Hitchcock inapplicable to these facts. Hitchcock did not create a per se rule of reversal when the trial judge gives a particular jury instruction.²¹ Instead, the Court focused on the specific facts of the sentencing proceeding and emphasized that both the judge and the jury be-

²¹ The judge's instruction in Hitchcock involved a statement to the jury that "the mitigating circumstances which you may consider shall be the following," followed by a listing of the statutory factors. Hitchcock, 107 S.Ct at 1824. The state trial judge in Elledge's case used a virtually identical instruction.

lieved themselves to be limited to statutory mitigating factors. See id., at 1823. Although parts of the jury instructions in Elledge's case were virtually identical to those in Hitchcock, the trial judge in Hitchcock, when sentencing the defendant, indicated he considered solely the statutory factors: "there were insufficient mitigating circumstances as enumerated in Fla. Statute 921.141(b) to outweigh the aggravating circumstances." Id., at 1824 (emphasis in the original). In the case before us, there is no such statement indicating an improperly narrow focus by Elledge's trial judge.

Moreover, we have in this record an affirmative statement by the state trial judge that indicates he did not feel he was limited to the statutory mitigating

factors. Specifically, in discussing whether a particular piece of evidence, which was of a nonstatutory mitigating nature, should be allowed into evidence, the judge said, "I don't think I am limited on mitigation to a specific statute." Tr. of Sentencing Proceedings, Vol. 8 at 246.

The differing factual setting presented here persuades us that Hitchcock is not dispositive of this case. Even assuming that the instruction to the jury was erroneous under Hitchcock, the sentencing jury in Florida's trifurcated capital scheme is merely advisory. The trial judge, alone, makes the ultimate decision as to sentencing in capital cases. See Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct 2960, 2966, 45 L. Ed.2d 913 (1976). When the trial judge

has the proper view of the law -- as is evident from the record here -- and imposes sentence based not only on statutory, but also on nonstatutory, factors, the resulting sentence meets the constitutional parameters outlined in Lockett.

Elledge argues, however, that his trial judge's improper view of the law is demonstrated by an earlier case in which the judge who sentenced Elledge was adjudicated by the Florida Supreme Court to have held "the mistaken belief that he could not consider nonstatutory mitigating circumstances." Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). Elledge also cites the record of a second earlier case, State v. Rose, which allegedly indicates that the same trial judge held an improper view. The death penalty in Rose eventually was over-

turned on other grounds. 425 So.2d 521 (Fla. 1983), cert. denied, 105 S.Ct 2689 (1985).

While this raises a concern about the trial judge's perceptions, we are unpersuaded. The two trials Elledge points to preceded Elledge's case; had they bracketed his trial they would be more conclusive. Additionally, the Florida Supreme Court, which reversed the trial judge for his mistaken views in Jacobs, was presented on appeal with the argument that the judge held that same, improper view in Elledge's trial. Although obviously aware of the possible problem -- to the point of having overturned a death sentence on those grounds in Jacobs -- the state supreme court found that the judge held no such erroneous perception in Elledge's case. We

agree.

In sum, the record reflects no manifestations that the trial judge held an improper view toward nonstatutory mitigating evidence.

IV. The Enmund v. Florida claim

Elledge maintains that his death sentence violated his eighth amendment rights as articulated in Enmund v.

Florida, 458 U.S. 782, 102 S.Ct 3368, 73 L.Ed.2d 1140 (1982). The key to his argument is an attempt to distinguish "causation" from "culpability."

Active participation in the murder vitiates the Enmund concerns. Hitchcock v. Wainwright, 745 F.2d 1332, 1340 (11th Cir. 1984), affirmed, 770 F.2d 1514 (11th Cir. 1985) (en banc), cert.

granted, 54 U.S.L.W. 3809 (June 9, 1986); Drake v. Francis, 727 F.2d 990, 997 (11th Cir. 1984), affirmed in part, reversed in part, remanded in part (all on other grounds) sub nom. Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc). There was no Enmund-type violation in this case.²²

V. Disparate Application of the Death Penalty

Elledge argues that the death penalty is applied in an unconstitutionally discriminatory manner in Florida. He points to empirical studies which indi-

²² We also note that the trial judge implicitly may have found Elledge intended to murder Strack when the judge found that the murder was committed to avoid arrest for rape. Such a factual finding, of course, would carry a presumption of correctness. Cabana v. Bullock, 106 S.Ct 689, 697-98, 88 L.Ed. 2d 704, 717-18 (1986).

cate that, when the victim is white, the death sentence is imposed in Florida at an aberrationally higher rate.

The Supreme Court recently rejected this same claim as based on a study of Georgia's application of the death penalty. See McCleskey v. Kemp, 107 S.Ct. 1756 (1987). The Court concluded that a petitioner who raises such an allegation "must prove that the decisionmakers in his case acted with discriminatory purpose." Id. at 1766 (emphasis in original). Elledge's claim cannot pass this scrutiny.

VI. Shackling

Just prior to selecting the jury that would sentence Elledge, the state trial judge announced that a law en-

enforcement official had informed the judge of two matters relating to Elledge. First, while incarcerated, Elledge had stated that, "because he had nothing to lose," he intended to assault the courtroom bailiff. Second, the law enforcement official also had informed the judge that, while in jail, Elledge had become proficient at karate. Accordingly, the trial judge -- acting on his own accord -- ordered Elledge placed in leg irons for the duration of the sentencing phase.

Defense counsel objected to the shackling order; the trial judge overruled the objection. Elledge then asked if he could "say something" and the trial judge refused. Elledge was shackled and remained so for the duration of his sentencing trial.

There is a troublesome question as to whether the appearance in shackles of a defendant whom the jury has just convicted of a gruesome crime is so inherently prejudicial that he is thereby denied his constitutional right to a fair capital sentencing proceeding.

Initially, the prejudice perceived when a defendant is seen in shackles by the jury involves the presumption of innocence. The issue has usually arisen in the context of a determination of guilt or innocence. Courts focus upon the prejudicial impact restraints have on the defendant's presumption of innocence. See, e.g., Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984); Collins v. State, 297 S.E.2d 503, 505 (Ga. App. 1982); State v. Tolley, 226 S.E.2d 353, 367 (N.C. 1976). Were this

the sole rationale which prohibits courtroom shackling, the defendant here would have no case. The jury knows he is not innocent. Having just convicted him of a crime that makes him a candidate for capital punishment, he is no longer entitled to a presumption of innocence.

Arguments could be made that the jury's view of such a convicted murderer would have no effect on the sentencing or, indeed, may benefit the defendant. A jury may be more inclined to give a life sentence if it feels a defendant can be securely confined, as evidenced by the shackles. Seeing that the defendant can be properly restrained, it is not necessary to give the death sentence in order to protect against future harm. On the other hand, a jury might view the

shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision.

With no definitive answer as to how the shackling at sentencing would affect the jury, it might be appropriate to consider the issue on a case-by-case basis and make a judicial evaluation as to the effect on the jury in each particular case. Much as we might be inclined to follow this path, it would not seem to be available if controlling precedents are faithfully followed. The problem is that the Supreme Court has not bottomed the prohibition against shackling on presumption of innocence alone. When a broader concern is

brought into play, there seems to be no reason to restrict the principles to the guilt-innocence phase of the trial. The language of the Supreme Court and this Court in opinions regarding shackling, gives full consideration to that broader concern.

The Supreme Court has characterized shackling as an "inherently prejudicial practice." Holbrook v. Flynn, 89 L.Ed. 2d 523, 534 (1986).²³ "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dig-

²³ Nothing in Holbrook indicates that the Supreme Court did not intend its ruling to apply to the penalty phase of a capital case; furthermore, it is unreasonable to believe that the court made its rule in Holbrook unaware that capital case trials are bifurcated. We think Holbrook means what it says.

nity and decorum of judicial proceedings that the judge is seeking to uphold."

Illinois v. Allen, 397 U.S. 337, 344

(1970). When shackling occurs, it must

be subjected to "close judicial scrutiny,"

Estelle v. Williams, 425 U.S. 501,

503-04 (1976), to determine if there was

an "essential state interest" furthered,

Holbrook, 89 L.Ed.2d at 534, by compel-

ling a defendant to wear shackles and

whether less restrictive, less prejudi-

cial methods of restraint were consid-

ered or could have been employed.

Holbrook, 89 L.Ed.2d 525; Woodard v.

Perrin, 692 F.2d 220, 221 (1st Cir.

1982); Hardin v. Estelle, 365 F.Supp.

39, 47, aff'd on other grounds, 484 F.2d

944 (5th Cir. 1973).

This Court has fully adopted the broad concerns reflected in the Supreme

Court opinions. Allen, 728 F.2d at 1413-14; Zygadlo v. Wainwright, 720 F. 2d 1221, 1223-24 (11th Cir. 1983), cert. denied, 466 U.S. 941 (1984).

Putting the case in the same posture as it would be had the shackling occurred at the guilt-innocence stage of the trial, it is apparent that resentencing is required. Before selecting the jury to sentence Elledge, the trial court suddenly announced that it had decided to shackle Elledge:

I received information from Chief Miro yesterday, the Chief of Detention for the Broward Sheriff's Office.

He told me he received information from two of the Lieutenants -- one in the jail, and one in the Detective Division -- that Mr. Elledge had become a karate expert, while in prison -- apparently; and he was going to attack my Bailiff, either on the way to the courtroom or in the courtroom, today, because he had

nothing to lose -- he is now serving two life sentences, plus fifty years for rape; and he is facing a death penalty, or another life sentence, arising out of this situation; that he has been adjudged guilty of these particular crimes.

In an abundance of precaution, I entered an Order to leave Mr. Elledge in leg irons here in these proceedings.

MR. McCAIN: For the record, the defense would object to it, in the presence of the jury, having the belief it would unduly influence and prejudice the jury against the defendant.

THE COURT: Fine. I think we ought to put it on the record.

THE DEFENDANT: May I say something, your Honor.

THE COURT: No sir. We will be in recess.

First, Elledge was denied the required procedure when the court refused him an adequate opportunity to challenge the untested information that served as the basis for the shackling. Under the

decided case law, the court should have given the defense a reasonable opportunity to meet the surprise information or at the very least should have allowed Elledge the opportunity to speak with his attorney, who then could have possibly made a more specific argument. Zygadlo v. Wainwright, 720 F.2d at 1223-24 (noting that due process may require an evidentiary hearing if the factual basis for security procedures was in dispute); State v. Moen, 491 P.2d 858, 860-61 (Idaho 1971) (defendant should be afforded a reasonable opportunity to meet the information); Tolley, 226 S.E. 2d at 368 (evidentiary hearing is required). Moreover, in Bowers v. Maryland, 507 A.2d 1072, 1078-81 (Md. 1986), cert. denied, 93 L.Ed.2d 265 (1986), the only case that squarely ad-

dresses shackling at the capital sentencing stage, the State's highest court found no error with the shackling after the defendant was given an opportunity to contest the necessity of shackling.

The record does not show whether Elledge was going to admit these allegations, contest them as false, or provide rebuttal evidence to indicate that he was behaving well as a prisoner, the last option recently recognized as mitigating evidence which must be considered by the sentencer. Skipper v. South Carolina, 90 L.Ed.2d 1 (1986). Only with an adversary process can the reliable evidence be sorted out from the unreliable. Future dangerousness can be determined only "when the convicted felon has the opportunity to present his own side of the case." Barefoot v.

Estelle, 463 U.S. 880, 901 (1983).

The second problem with the shackling decision is that the State at no time made any showing that the shackling was necessary to further an essential state interest. Needless to say, the security and safety of a state's courtrooms is an essential state interest.

Holbrook, 89 L.Ed.2d at 534. There is no indication that the trial court considered alternative restraints, as the court is required to do. Id. at 530-32; Woodard, 692 F.2d at 221; Hardin, 365 F.2d at 47. Safeguards deemed necessary by other courts dealing with the issue are absent in Elledge's case. The trial court never "polled the jurors to determine whether any of them would be prejudiced by the fact that the defendant was under restraints." Woodard, 692 F.

2d at 222. See also, Bowers, 507 A.2d at 1081 (voir dire adequate to screen out one juror who indicated shackling would influence him). The trial court also gave no specific cautionary instruction. See, e.g. Billups v. Garrison, 718 F.2d 665, 668 (4th Cir. 1983); Commonwealth v. Brown, 305 N.E. 2d 830, 834 (Mass. 1973).

Since these matters could not now be satisfactorily determined by an evidentiary hearing in federal district court after the passage of ten years since sentencing, it is quite appropriate that a writ of habeas corpus issue as to the capital sentence, with the state to have the right to conduct a constitutional sentencing procedure.

Conclusion

The district court's judgment is vacated and the case is remanded to the district court with directions to issue the writ of habeas corpus setting aside the sentence of death in the absence of a new sentencing trial.

EDMONDSON, Circuit Judge, concurring in part and dissenting in part:

Although I am unwilling to concur in the court's judgment, I concur in its opinion except that part of the opinion concerning shackling of persons already found to be guilty of serious violent crimes.

The court holds that Elledge is entitled to a new sentencing hearing because the majority feels that shackling Elledge without first holding a hearing violated Elledge's constitutional right to a fair trial. I believe that the per se rule the court adopts today represents an extension of the law unrequired by the Constitution or binding precedent. I therefore respectfully dissent.

Before examining the law in this area, it is important to remember the

situation in which this shackling occurred. Elledge had confessed to and pled guilty to the violent, brutal murder of Margaret Strack. Moreover, by the time he faced sentencing for the Strack murder, Elledge also had been convicted of a second murder that he committed during an armed robbery some two days after he killed Strack. See Elledge v. Florida, 346 So.2d 998, 999-1000, 1001 (Fla. 1977). In other words, Elledge was not a person who, in a fit of passion, had committed one aberrant killing in an otherwise exemplary life. The state trial judge declared, on the record, that he had received information from law enforcement officials that, while in prison, Elledge had vowed that because "he had nothing to lose" he intended to assault the courtroom bailiff

while at sentencing. Moreover, the judge stated that he had been informed that, while in prison, Elledge had become proficient at karate. After stating this information on the record, the judge ordered the prisoner's legs shackled. Although an objection was made to the shackling, the defense did not request a hearing,¹ nor did the defense

¹ Although the court apparently places great weight on Elledge's question -- i.e., "May I say something" -- it is unwilling to categorize this question as a request for a hearing. I agree that this question cannot be viewed as a hearing request. Elledge was neither pro se nor co-counsel pro se. In such a setting the trial judge is justified in listening solely to the defense's representative -- in this case, the lawyer. In fact, the trial judge may be required to listen solely to the defense's representative. See generally State v. Tait, 387 So.2d 338, 339-40 (Fla. 1980); Thompson v. State, 194 So.2d 649, 650-51 (Fla. Dist. Ct. App. 1967). Needless to say, there may have been several tactical reasons why defense counsel did not actually want his client to be heard regarding this supposed attack on the bailiff. For example, defendant's story

contest the factual accuracy of the judge's statements,² request curative instructions or suggest alternative, less restrictive means of restraint.

The court says that in such a situation the state trial judge violates the Constitution unless he holds a hearing before restraining the already-convicted defendant. In other words, the court today creates what seems to be a per se rule that requires a state trial judge always to hold a hearing before shackling a defendant at the sentencing phase

may have buttressed rather than undercut the view that defendant was dangerous or counsel may have feared that defendant would perjure himself. See generally Nix v. Wainwright, 106 S.Ct 988, 994 (1986) (counsel's duty of advocacy and loyalty is limited to lawful conduct; counsel cannot take steps that aid presentation of false evidence).

² The defense has never denied the factual accuracy of the assault claim in any subsequent stage of Elledge's proceedings.

of a bifurcated trial -- even when no hearing is requested. I cannot agree that the Constitution requires this.

Three major points refute the court's position. First, this case is not controlled by precedent because no federal court has addressed the constitutional impact of shackling at sentencing. All of the cases decided by federal courts involve courtroom security restraints of an accused at the guilt-innocence stage of trial. The primary constitutional concern at the guilt-innocence phase -- fear that the restraint will interfere with the defendant's presumption of innocence -- is not present here; the absence of this pivotal concern renders the guilt-innocence phase inapposite to sentencing phase shackling. Second, even when an

accused's presumption of innocence is directly impacted -- i.e., when the accused is restrained at the guilt-innocence stage -- federal appellate courts have not reversed a trial judge's exercise of discretion in imposing restraint. Third, we are reviewing a state court proceeding; therefore, we examine this case solely for constitutional error and not under our powers of supervision. That is, our personal views of how the state trial judge ought to have acted are irrelevant, as is whether we would require, in our supervisory capacity, a federal trial court to have acted differently.

The court says that we are bound by precedent to reach the result it reaches.³ I must stress, however, that

³ For example, the majority states that a reversal is required if "controlling

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in Part IV that counsel's performance was deficient. Ground No. 5 (1128).

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For the reasons which will be developed in Part IV, the Court finds that there

and have been no different result if a

continuance had been granted, a proper

investigation conducted by counsel, and

the proper effort to be made in the

in the trial to be made in the

hearing. In the event that the

proffered testimony might involve the

habeas corpus issue, it is our opinion that

"the proffered evidence of non-statutory

mitigating evidence would not have af-

fected the sentencing outcome in this

case had it been submitted to the jury."

Francis v. Wright, 763 F.2d 1128,

1190 (11th Cir. 1985) (case similar to

Elledge in that Petitioner was multiple

killer, mitigating evidence of sordid

Neither the United States Supreme Court, nor any federal circuit court of appeals has addressed the constitutional impact -- if any -- of physical restraints imposed on a convicted murderer at the sentencing stage of a bifurcated state trial. Instead, the case law concerns shackling at the guilt-innocence stage of trial. The distinction between the two settings is crucial because the single major analytic thrust of all the guilt-innocence phase cases is to determine whether the defendant's right to a presumption of innocence⁴ was infringed by the security measure adopted by the

⁴ While not specifically set forth in the Constitution, the precept that a defendant is presumed innocent by the American justice system until proven innocent has been deemed a critical part of the right to a fair trial. See Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct 1691, 1692, 48 L.Ed.2d 126 (1976).

trial court.⁵

Elledge is unentitled to a presumption of innocence; once that overriding concern is eliminated from the evaluation, our analysis must be different. The guilt-innocence stage cases are materially different in three respects. When the defendant's right to a presumption of innocence is not present, the defendant's constitutional interest in

⁵ I agree that courts addressing the issue of courtroom restraints on occasion have mentioned other factors -- e.g., restraints are somewhat of an affront decorum, shackling may confuse the defendant -- than possible impact on the presumption of innocence. None of those cases imply in any way, however, that the other factors would be sufficient, if standing alone, to violate the Constitution. Nor do they imply that the analysis would be identical if the presumption of innocence was not at risk. In fact, even in those cases in which other factors are mentioned, the critical issue emphasized by all of those courts is whether the security measure might interfere with the defendant's right to a presumption of innocence.

remaining unshackled is severely reduced. Moreover, the court is notified that courtroom security is at issue. Finally, in such a setting a juror's view toward the shackles is substantially altered because the shackles are expected. Cases involving the guilt-innocence phase shackling of defense witnesses provide an apt illustration of these significant differences.

On occasion, courts have ordered a defendant's witnesses shackled when those witnesses are inmates in maximum security prisons. Shackling an inmate witness is analogous to shackling a defendant at the sentencing phase and reflects the three differences mentioned above.

First, the decision to shackle an inmate witness is similar because such a

witness, as a convicted felon, has no right to a presumption of innocence.

See Harrell v. Israel, 672 F.2d 632, 637 (7th Cir. 1982) ("Presumably, a person confined in a maximum security institution has committed at least one serious breach of the law. With respect to that offense, he is not presumed innocent.")

Second, courts facing this issue in the inmate-as-witness setting have recognized that one's status as a convicted felon raises the presumption that the inmate is dangerous; phrased differently, it places the trial court on notice that courtroom security is at risk.

"Should such a [convicted felon] ... harbor any thoughts of escape, revenge or violence, the courtroom would provide the most obvious opportunity to act on them. Less intrusive measures may have

an even more detrimental impact on the jury than shackles." Id. See United States v. Fountain, 768 F.2d 790, 794 (7th Cir.) (decision to shackle witnesses was prudent given fact that most witnesses were murderers), amended in part on other grounds, 777 F.2d 345 (7th Cir. 1985), cert. denied sub nom. Silverstein v. United States, 106 S.Ct 1647 (1986), cert. denied sub nom. Gometz v. United States, 106 S.Ct 1647 (1986). The same is true whenever any person convicted of a violent felony appears before the court.

Shackling an inmate witness is similar to sentencing phase shackling for a third reason: the jurors view the shackles differently and are likely less prejudiced by the shackles. "The prejudice caused by shackling was mitigated

by the jury's awareness that the entire dramatis personae in the two cases were prison inmates -- most of them murderers -- and guards. The shackles could not have come as a surprise." Id. (emphasis added). See generally Wilson v. McCarthy, 770 F.2d 1482, 1485 (9th Cir. 1985) (shackling of witness was justified by security concerns consisting of witness's prisoner status, seriousness of witness's prior conviction and that case involved prison gang). This analysis recognizes the common sense proposition that most citizens would not be surprised at -- and probably would endorse -- the practice of physically restraining felons convicted of violent crimes when those felons are removed from the controlled environment of their penal institutions. The Supreme Court

acknowledged this practical, "common human experience" reality in Holbrook when it noted that four uniformed troopers in the courtroom "are unlikely to have been taken [by the jury] as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why [more extensive security precautions were not in effect.]" Holbrook, 106 S.Ct at 1347, 89 L.Ed.2d at 536 (emphasis added). The jurors in Elledge's case certainly had "some other reason" -- i.e., other than the shackles -- to believe Elledge was dangerous; many might have wondered why the state did not impose additional restraints.

Holbrook indicates that in deciding whether a particular security measure is inherently prejudicial courts must rely on "reason, principle, and common human experience." Id. at 1346, 89 L.Ed.2d at 535 (quoting Estelle v. Williams, 425 U.S. 501, 504, 96 S.Ct 1691, 1693, 48 L. Ed.2d 126 (1976)). Fountain, Harrell and Wilson all illustrate by analogy that shackling at the sentencing phase raises different concerns than guilt-innocence phase shackling and is not inherently prejudicial. The court admits as much when it notes that there is "no definitive answer as to how the shackling at sentencing would affect the jury." Supra, at ____.⁶ Thus, reason,

⁶ In fact, shackling may help a murderer avoid the death penalty; some empirical evidence exists that supports such a view. In a poll released on January 12, 1987 by the Associated Press, 86

principle and common human experience

percent of the people polled stated that they supported the death penalty. Significantly, the number one justification cited for the death penalty -- given by 42 percent of its supporters -- was "to protect society from future crime that person might commit." That is, many people who support the death penalty view it as a means, albeit an extreme one, to ensure that the criminal will not commit the same kind of crime in the future. Shackles are an outward sign that the criminal is securely controlled and demonstrates that the state can and will prevent the prisoner from being able to commit violent crimes again.

This information is not meant to prove that shackles in fact aided Elledge. Instead, I believe this kind of data demonstrates that we do not know how a sentencing juror reacts when he sees that a felon convicted of a violent murder is shackled. I therefore agree with the court's statement that "there is no definite answer" as to whether shackles are prejudicial. This seems to me to lead to the inexorable conclusion that it cannot be inherently prejudicial to shackle a defendant at the sentencing phase of his trial. Because this court has no more reason to believe that such shackling is prejudicial than to believe that it is not, this court should not hold that sentencing phase shackling is inherently prejudicial. Certainly, I am unwilling to presume prejudice.

demonstrate that sentencing phase shackling cannot be inherently prejudicial.

Significantly, even when the presumption of innocence is directly at risk -- i.e., when an accused is shackled at the guilt-innocence stage of trial -- the federal courts of appeal and United States Supreme Court have refused to interject their view of what trial courts ought to do. Decisions concerning courtroom security are accorded broad discretion. Simply put, the amount of security required in a particular courtroom, for a particular felon, in a particular community on a particular day is a highly intuitive decision that must be based on experience, common sense and sensitivity to all the circumstances of the moment. Obviously, the trial judge is the best person to

make such decisions; reviewing courts consequently reverse only for abuse of discretion. See Wilson v. McCarthy, 770 F.2d 1482, 1484 (9th Cir. 1985); Harrell v. Israel, 672 F.2d 632, 636 (7th Cir. 1982); Payne v. Smith, 667 F.2d 541, 544 (6th Cir. 1981); Passman v. Blackburn, 652 F.2d 559, 568 (5th Cir. Aug. 6, 1981), cert. denied, 102 S.Ct. 1722 (1982).

A survey of the case law concerning the use of shackles and other security measures at the guilt-innocence phase demonstrates my point. The court has not cited, nor have I found, a single case in which either a United States Circuit Court of Appeals or the United States Supreme Court has overturned a trial judge's decision to employ courtroom security measures even at the

guilt-innocence phase. That is, even when the security procedure strikes at the bedrock precept that an accused is presumed innocent until proven guilty, courts have been loath to interfere with the trial court's use of discretion in the area of security-related decisions. It is counterintuitive to reach a different result when the fundamental concern is not present.

Moreover, not only should we generally defer to a trial court's discretion in courtroom-security decisions, our scope of review is severely restricted. Our task "is not to determine whether it might have been feasible for the State to have employed less [intrusive] security measures in the courtroom."

Holbrook, 106 S.Ct at 1347-48, 89 L.Ed. 2d at 536. Although if we were exercis-

ing our supervisory capacity "we might express a preference" that less intrusive measures be adopted, "we are much more constrained when reviewing a constitutional challenge to a state court proceeding." Id. at 1348, 89 L.Ed.2d at 536-37. It is important for us to remember that "all a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." Id. at 1348, 89 L.Ed.2d at 537.

Therefore, it is irrelevant, for constitutional review purposes, whether the state trial judge considered less intrusive alternative restraints or did not issue, sua sponte, curative instructions. See Wilson v. McCarthy, 770 F.2d

1482, 1485 & n. 3 (9th Cir. 1985) (while it "may have been the better course" for court to issue curative instruction, court of appeals "decline[d] to impose upon the trial court the mandatory responsibility of given such an instruction."); Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982) ("a judge should consider less restrictive measures before deciding to shackle a defendant") (emphasis added). It may have been the better course to consider less restrictive alternatives, issue sua sponte curative instructions or conduct a sua sponte hearing. What we may view as the better course, however, is not always required by the Constitution. See Holbrook, 106 S.Ct at 1347-48, 89 L. Ed.2d at 536-37.

In summary, I believe that today's

court has overstepped the proper boundary between federal and state courts and has extended case law that is fundamentally inapposite to the situation this case presents. When the pivotal issue of presumption of innocence is lacking, the defendant's constitutional rights are significantly less. Treating unconvicted persons the same as convicted persons grossly trivializes the rights of persons not convicted of crimes. Shackling can look harsh; and I personally would not impose it lightly. Nevertheless, under the facts as presented here, shackling Elledge did not deprive him of his constitutional right to a fair trial.⁷

⁷ Because we need only decide whether the steps taken in this case violated Elledge's constitutional rights, it suffices here to conclude that in this particular setting -- i.e., when (1) a state trial judge, (2) shackles the de-

We are unjustified in placing yet another aspect of state trial practice under the heavy-handed superintendence of the federal courts. The court today vests convicted felons with a new federal constitutional right; that is, the

defendant for specific, articulable reasons, in addition to the defendant's status as a felon convicted of a violent murder, (3) enters those reasons in the record, (4) the defense does not request a hearing, (5) the defense does not request curative instructions, and (6) the defense does not suggest less intrusive restraints -- shackling the defendant at the sentencing phase of a state murder trial at which the death penalty is sought does not offend the Constitution. I emphasize that I do not intimate that any of these elements is necessary or that the absence of one or more of them would affect my view. I also do not preclude the possibility that, as a matter of constitutional law, the trial judge could, without holding a hearing, have the defendant physically restrained at the sentencing phase of a bifurcated state trial solely on the basis of the defendant's status as a violent felon. Although I agree that it is normally a good practice to hold a hearing before restraining defendants or witnesses, I do not think that the Constitution requires a hearing in all circumstances.

right to appear in court unfettered unless a hearing is held first and the evidence at the hearing shows us that shackling was truly essential.⁸ The restriction on the powers of state courts has not been shown to be imperative to assure the fundamental fairness of sentencing proceedings. I do not believe appellant is entitled to a new sentencing hearing because he was shackled; therefore, I would affirm the district court's denial of the petition for a writ of habeas corpus.

⁸ Federal courts are "forever adding new stories to the temple of constitutional law, and the temples have a way of collapsing when one story too many is added." Douglas v. Jeannette, 319 U.S. 157, 181, 63 S.Ct 877, 889, 87 L.Ed. 1324 (1943) (Jackson, J., concurring in part and dissenting in part) (quoted in Miranda v. Arizona, 384 U.S. 436, 526, 86 S.Ct 1602, 1654-55, 16 L.Ed.2d 694 (1966) (Harlan, J., dissenting)). I would not add to the temple in these circumstances.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-5120

WILLIAM DUANE ELLEDGE,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,

Respondent-Appellee.

Appeal from the
United States District Court for the
Southern District of Florida

ON PETITIONS FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(November 10, 1987)

Before RONEY, Chief Judge, HATCHETT and
EDMONDSON, Circuit Judges.

PER CURIAM:

Part III of our original opinion
(823 F.2d 1439) is, hereby, withdrawn.

Except for this modification, the petitions for rehearing are denied. The Court having been polled at the request of one of its members and a majority of the judges in active service not having voted in favor of it, the petition for rehearing in banc is denied.

FAY, Circuit Judge, dissenting, in which Judges TJOFLAT, HILL and EDMONDSON, join:

Most respectfully, I dissent from the failure of the court to take this case for in banc consideration. I agree with the dissent of Judge Edmondson as to that section of the panel opinion dealing with shackling. Where guilt or innocence is in question there can be no doubt about the possible prejudice when

a defendant appears in court in shackles. But to place this defendant in the same posture as one going to trial to determine guilt or innocence is simply wrong. Elledge had plead guilty. He was no longer entitled to the presumption of innocence.

Equally troubling to me are some of the other reasons stated by the majority for granting relief. The state trial court is faulted for not holding a hearing, and thus not affording the defense a reasonable opportunity to refute the information received by the trial judge. However, no hearing was requested! The state trial court is also faulted for not affording the defendant an opportunity to speak with his attorney. Immediately after the trial judge announced what he had

learned and what he was going to do, however, he announced a recess. What better time for the defendant and his counsel to confer could have been provided? The state trial court is further faulted for not affording the defendant an opportunity to explain or deny what the judge had heard. Again, the answer is that the defendant's counsel did not request to respond.

The state court is faulted for not considering alternatives to shackling. We have no way of knowing what was or was not considered by the state trial judge. If we are going to guess, assume or presume, however, I would assume that he considered many alternatives. Common sense tells me that no judge would order a defendant shackled without very serious and deliberate consideration. The

state trial court is also faulted for failing to conduct a poll of the jury as to possible prejudice. Once again, no poll was requested!

Even when reviewing a criminal trial held in a federal court, we generally try to correct prejudicial mistakes made in the trial court. Rulings are most often based upon affirmative requests of the litigants or objections to questions or actions being taken. In this instance we are reviewing, by way of a collateral attack, a case tried and reviewed in the state courts. It is my opinion that we have failed to accord the state proceedings that deference required under the law. See, e.g., Holbrook v. Flynn, 106 S.Ct 1340, 1348 (1986); Wainwright v. Witt, 105 S.Ct 844, 854 (1985); Patton v. Yount, 467

U.S. 1025, 1036-38 (1984). In addition, we are granting relief based upon the failure to do things which defendant's counsel never requested while speculating that explanations were available that have never been subsequently alleged. For these reasons, I dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-6176-CIV-EBD

WILLIAM DUANE ELLEDGE,

Plaintiff,

versus

LOUIE L. WAINWRIGHT,

Defendant.

FINAL ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

THIS MATTER is before the Court on the petition for the writ of habeas corpus filed by WILLIAM DUANE ELLEDGE, a State prisoner sentenced to death for the 1974 murder of Ms. Margaret Strack. An evidentiary hearing was held on July 2 and 3, 1985 on the issue of ineffective assistance of counsel at the sentencing stage. At the hearing, the

Court heard testimony from several witnesses for the Petitioner. Counsel for the Petitioner and counsel for the Respondent introduced new evidentiary material, which this Court has reviewed.

After careful consideration of the evidence introduced at the hearing, as well as the entire record in this case, it is:

ORDERED AND ADJUDGED that the Petition for the Writ of Habeas Corpus is hereby DENIED, for the reasons expressed in this Order.

I. PROCEDURAL BACKGROUND

Petitioner's death sentence has been reviewed extensively by the state and federal courts prior to this habeas corpus petition. Mr. Elledge's conviction for the first degree murder of Margaret Strack was upheld by the Florida Supreme Court in Elledge v. State,

346 So.2d 998 (Fla. 1977). However, the Florida Supreme Court set aside Elledge's death sentence and remanded the case to the trial court for a new sentencing proceeding, which is the matter challenged in this habeas corpus petition. A new sentencing trial was conducted on August 2, 1977 before the original trial judge, the Honorable M. Daniel Futch, Jr. Once again, Petitioner was sentenced to death by electrocution. The Florida Supreme Court affirmed the second death sentence in Elledge v. State, 408 So.2d 1021 (Fla. 1981). The United States Supreme Court denied certiorari in Elledge v. Florida, 459 U.S. 981 (1982) and denied rehearing in Elledge v. Florida, 459 U.S. 1137 (1983). During the pendency of his direct

appeal to the Supreme Court of Florida, Petitioner joined 122 other death row inmates in a state habeas corpus proceeding challenging the Florida Supreme Court's practice of reviewing non-record information concerning the personal backgrounds and mental health status of capital appellants. The Florida Supreme Court denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); the United States Supreme Court denied certiorari, Brown v. Wainwright, 454 U.S. 1000 (1981).

Following the exhaustion of Mr. Elledge's direct appeals, and the rejection of an executive clemency request made to the Governor of Florida, Petitioner filed with the state trial court a motion to vacate judgment and sentence, pursuant to Fla.R.Crim.P. 3.850.

Petitioner also filed two original petitions in the Florida Supreme Court collaterally attacking his death sentence. The Florida Supreme Court rejected all the collateral attacks. Elledge v. Graham, 432 So.2d 35 (Fla. 1983). Certiorari was denied by the United States Supreme Court in Elledge v. Florida, ___ U.S. ___, 104 S.Ct 436, 78 L.Ed.2d 368 (1983).

The procedural history has been recited here to emphasize the narrow scope of review by this Court. The habeas corpus statute requires this Court to presume the validity of factual findings made by the state courts, unless one of the exceptions, not present here, exists. See 28 U.S.C. §2254(d) (1)-(8). See also Sumner v. Mata, 449 U.S. 539 (1981) (provisions of 28 U.S.C.

§2254 require federal courts to presume the correctness of state appellate court findings of fact, as well as presume the correctness of state trial court findings.)

The delay in these proceedings, regarding a death sentence for a murder which occurred in 1974, was occasioned in part by a change in the law. Petitioner's guilt is unquestioned; he confessed to the brutal rape and murder of Margaret Strack. At the time of the Strack homicide, it was not clear whether the death penalty was constitutionally permissible. In Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (nine separate opinions, 5 concurring and 4 dissenting, one written by each of the Justices), the Supreme Court found that the particular death sentences on

first degree murder) 44/506 also, Roberts
vs. Louisiana, 411 U.S. 833 (1967) (5-
 clating unconstitutional as statutes which
 imposed a mandatory death penalty for
 the murder of a policeman, 44/507 and yet
 in The Florida death penalty statute,
 similar to the Model Penal Code, was up-
 held by the Supreme Court in Proffitt vs.
Florida, 438 U.S. 342 (1978) (11 The
 statute contains specific aggravating
 factors in Fla. Stat. § 921.41(2), (3)
 and is designed against specific mitigating
 factors in Fla. Stat. § 921.41(4) (5).
 Thereby, the statute guides sentencing
 discretion by requiring specific factors
 for the purpose of favoring or against
 imposition of the death penalty, thereby
 eliminating total arbitrariness and thus
 capital offenses, the imposition of the
 death penalty. Proffitt vs. Florida, 438

first degree murder). See also, Roberts v. Louisiana, 431 U.S. 633 (1977) (declaring unconstitutional a statute which imposed a mandatory death penalty for the murder of a policeman).

The Florida death penalty statute, similar to the Model Penal Code, was upheld by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976). The statute contains specific aggravating factors (in Fla. Stat. §921.141(5)) to be balanced against specific mitigating factors (in Fla. Stat. §921.141(6)). Thereby, the statute guides sentencing discretion by "requiring specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428

U.S. 242, 258 (1976).

Elledge's death sentence, which was one of the first death sentences reviewed by the Florida Supreme Court after the Proffitt decision, was overturned because an aggravating factor under Fla. Stat. §921.141(5)(c) -- Mr. Elledge's murder of Mr. Nelson in Jacksonville approximately two nights after the Strack homicide -- was improperly considered by the trial court when it imposed the death penalty during the first sentencing proceeding. See, Elledge v. State, 346 So.2d 998, 1003-1004 (Fla. 1977). In this Court's review of the sentencing trial upon remand, which led to Petitioner's second sentence of death for the murder of Margaret Strack, the state trial court properly followed the constitutionally-

required procedures for death cases. We will now briefly review the 12 grounds for relief in the Amended Petition for Writ of Habeas Corpus before turning to the subject of the evidentiary hearing, the claim of ineffective assistance of counsel at the sentencing stage.

II. TWELVE GROUNDS FOR WRIT OF HABEAS CORPUS OTHER THAN INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING TRIAL REJECTED

Petitioner cited twelve grounds for the writ of habeas corpus. See Amended Petition for Writ of Habeas Corpus at 12(A) - 12(L). All twelve grounds are without merit. As this Court has previously informed present counsel for Petitioner, the only claim which this Court considers worthy of serious attention is the claim -- not enumerated as one of the 12 points in the Amended Petition for Writ of Habeas Corpus -- of

ineffective assistance of counsel at the sentencing trial. The twelve grounds in the Amended Petition are flawed for two reasons: (1) Petitioner pled guilty to first-degree murder, and (2) the legal grounds have been raised, considered, and rejected on the merits previously by other courts. Therefore, this Court will not re-open matters previously decided, and decided correctly in the view of this Court.

Petitioner, ELLEDGE, represented by counsel, knowingly and voluntarily entered a plea of guilty to murder in the first degree for the murder of Ms. Margaret Strack. The major ground running throughout the twelve grounds in the Amended Petition is that Mr. Elledge did not intend, in the legal sense, to kill Margaret Strack because of mental

disorder. See especially Ground No. 1 (¶12B) (lack of criminal intent defense could have been raised); Ground No. 3 (¶12C) (death, disproportionate sentence on these facts); Ground No. 4 (¶12D) (VI ineffective assistance at guilt trial because available defense of intent not raised); Ground No. 6 (¶12F) (lack of intent); Ground No. 8 (death sentence on these facts shocks the conscience).

Regardless of what Petitioner may claim at this time, Petitioner's plea of guilty means that he has admitted that he had intended to kill Ms. Strack. Premeditation is an essential element to first-degree murder. See, Fla. Stat. §782.041(a) (first-degree murder). The statute defines first-degree murder as a capital felony. Id. Petitioner knew

that the penalty for a capital felony was 25 years, minimum, imprisonment without parole, unless the sentencing trial conducted under Fla. Stat. §921.141 resulted "in findings by the court that such person shall be punished by death, and in the later event such person shall be punished by death." Fla. Stat. §775.082(a) (Penalty for capital felony conviction).

Petitioner has made no claim that his counsel failed to inform him of the consequences of his plea of guilty to first-degree murder -- the consequences including the possibility of a death sentence and that there would be no further trial of any kind on the question of Petitioner's guilt to premeditated first-degree murder. Petitioner is presumed to have been informed of the

charges by counsel. Henderson v. Morgan, 426 U.S. 637 (1976). The federal court cannot make a determination of the credibility of Petitioner's claims that he did not understand the consequences of the guilty plea -- admission of the plea is tantamount to a finding of lack of credibility. Marshall v. Lonberger, 459 U.S. 422 (1983). Further, the Petitioner's plea of guilty was not rendered involuntary because of the possibility of death or motivation or expectation of a lesser penalty than if a jury trial on guilt were held, and the jury found Petitioner guilty of capital murder. Brady v. United States, 397 U.S. 742 (1970). Guilty pleas are necessary to our system of justice and constitutional. See, e.g., Blackledge v. Allison, 421 U.S. 63

(1977); Santolillo v. New York, 404 U.S. 257 (1971); Brady v. United States, 397 U.S. 742 (1970). Therefore, the fact of Petitioner's intent to kill Margaret Strack has been established.

To the extent that the Amended Petition raises issues of violation of state law, federal habeas corpus relief is not available to correct an error of state law unless so egregious to deny due process or equal protection. Pulley v. Harris, 465 U.S. ___, 104 S.Ct 871, 79 L.Ed.2d 29 (1984). See, Amended Petition ¶12E (denial of continuance) and ¶12G (leg irons).

To the extent the Petition raises grounds which were not raised below, the Petition fails because no show of cause and prejudice for a federal habeas corpus court to review the claims has

been made under the standard of Wainwright v. Sykes, 433 U.S. 72 (1977). See Amended Petition, ¶12B (guilty plea not knowingly waived) and ¶12D (ineffective assistance of counsel at trial).

The most basic reason the Petition fails is that the claims have been reviewed before; therefore, under judicial rules of preclusion for issues of law actually and necessarily litigated previously and the federal habeas statute's presumption of correctness of factual findings of state courts, the Petition must be denied. However, in an abundance of caution, the Court will list the twelve grounds in the Petition and discuss their merits.

The grounds are, as stated in the Petition: (1) Petitioner's right not to be compelled to incriminate himself

was violated by prolonged, repetitive, continuous police interrogation in the face of his assertion of his right to remain silent, and the statements finally given by petitioner as a result of such interrogation should have been suppressed; (2) Because Petitioner's testimony during the guilty plea proceeding raised a defense, which petitioner did not specifically and understandingly waive, his guilty plea was entered unknowingly and unintelligently, requiring that he be given the opportunity to withdraw his plea; (3) On the basis of what is now known but not considered at trial concerning the mental and emotional condition of Bill Elledge, his life history, and the consequences of the offense in question, death is a disproportionate sentence, forbidden by the VIII.

and XIV Amendments, and the imposition of death without consideration of these critical facts denied Bill Elledge the individualized sentencing determination mandated by the VIII and XIV Amendments; (4) Petitioner was deprived of effective assistance of counsel at trial in violation of his rights guaranteed by the VI and XIV Amendments; (5) The trial court's denial of petitioner's request for a continuance deprived petitioner his right to a fair trial; (6) Petitioner did not intentionally take the life of Margaret Strack, and accordingly, cannot be put to death for her homicide; (7) The circumstances under which the trial court at the sentencing trial ordered petitioner to be restrained in leg irons throughout the course of his trial denied petitioner

due process and the right to a reliable sentencing procedure; (8) Petitioner's death sentence shocks the conscience because the proceedings used to impose it were grossly unreliable and wholly arbitrary, and, thus, failed to meet the safeguards required by the VIII and XIV Amendments for the constitutional imposition of the death penalty; (9) The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case violated the court's unique responsibilities in the review of capital prosecutions; (10) The Supreme Court of Florida's practice, unauthorized and unannounced by statute or rule, of requesting and receiving ex parte information concerning appellants in pending capital appeals, without notice to these

appellants or their attorneys, denied or appeared to deny death-sentenced appellants, including Mr. Elledge, due process of law, the effective assistance of counsel, and the right of confrontation and subjected them to cruel and unusual punishment and to compulsory self-incrimination, in violation of the XIV Amendment and its incorporated guarantees; (11) The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution; and (12) As applied, the Florida death penalty statute violates the VIII and XIV Amendments because it fails to channel jury discretion and permit the interjection of irrelevant factors into the sen-

tencing process by the jury and trial judge.

The Court has reviewed Petitioner's confession and finds that the police complied with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966).

The facts, as found below, establish that Petitioner knowingly and intelligently chose to speak with police officers. Further, Petitioner's plea of guilty to the offense of the first-degree murder was a knowing and intelligent choice, based upon the alternatives before him, as found by the trial court and reviewed previously by the state and federal court system. See, Procedural History, supra, Part II. Therefore, grounds one and two are rejected by this Court. (Amended Petition ¶12A and ¶12B).

The Court declines the opportunity

to declare the entire Florida death penalty system arbitrary and capricious, Ground No. 11 (¶12K), as suggested by counsel for Petitioner. The statistical evidence provided by Petitioner, largely based upon the findings of Stanford University Professor Samuel R. Mauro (Stanford School of Law) and Robert Mauro (Stanford Department of Psychology) is insufficient. See, McCleskey v. Kemp, 753 F.2d 877, 892 (11th Cir. 1985) (en banc) (holding that statistical proof of disparate racial impact alone is insufficient to invalidate a capital sentencing scheme). The race issue with regard to capital punishment seems particularly off-point in this case, where both the killer and the victim were white. The Florida Supreme Court's practice of review of ex parte evidence,

Ground No. 10 (¶12J), has been considered and rejected in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert.denied, 454 U.S. 1000 (1981). This Court cannot say the Florida Supreme Court conducts a " cursory review " of death sentences, Ground No. 9 (¶12I), indeed, Petitioner Elledge's first sentence of death was overturned when the Florida Supreme Court reviewed the death sentence in Elledge v. State, 346 So.2d 998 (Fla. 1977). Nor can this Court state that, as applied, the Florida death penalty statute is unconstitutional. The Court finds no "irrelevant factors" considered by the trial court in this case, and until Proffitt v. Florida, 428 U.S. 242 (1976) (holding Florida death penalty statute valid) is overruled or modified, this Court adheres to the view that the

statute is both facially valid, and valid as applied to Petitioner Elledge, Ground 12 (§12L).

Lockett v. Ohio, 438 U.S. 586 (1978) requires that there can be no limitation on what a defendant can offer in mitigation of sentence. As discussed in Part IV of this Order, we believe that whether or not Mr. Elledge's sentencing trial counsel understood his penalty phase proceedings as limited by the specific mitigating factors contained in the Florida Statute, counsel's performance at the sentencing trial was constitutionally deficient. (The Lockett issue in Ground No. 5 (§12E). Similarly, the denial of a continuance and counsel's failure to prepare and adequately investigate Petitioner's background support this Court's finding

in Part IV that counsel's performance was deficient, Ground No. 5 (¶12E). For the reasons which will be developed in Part IV, the Court finds that there would have been no different result if a continuance had been granted, a proper investigation conducted by counsel, and the witnesses proffered at the sentencing trial who testified at the evidentiary hearing. To the extent that the proffered testimony might involve the Lockett issue, it is our opinion that "the proffered evidence of non-statutory mitigating evidence would not have affected the sentencing outcome in this case had it been submitted to the jury." Francois v. Wainwright, 763 F.2d 1188, 1190 (11th Cir. 1985) (case similar to Elledge in that Petitioner was multiple killer, mitigating evidence of sordid

and impoverished childhood environment would not have changed sentencing outcome). The appearance of Petitioner before the sentencing jury in leg irons was not an abuse of discretion on the part of the trial judge, who feared for the safety of the participants at the trial. See, Elledge v. State, 408 So.2d 1021, 1022-1023 (Fla. 1981) (holding no abuse of discretion).

III. BACKGROUND TO INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING TRIAL CLAIM

The evidentiary hearing was called by this Court in order to make a determination of Petitioner's VI Amendment claim of ineffective assistance of counsel at the sentencing stage of the proceedings against him for the murder of Ms. Margaret Strack. The Court considers the ineffectiveness claim the on-

ly claim by Petitioner with arguable merit. As in all VI Amendment ineffectiveness claims, this case is controlled by the Supreme Court's decision last year in Strickland v. Washington, ___ U.S. ___, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). Strickland not only controls this case, it is also factually quite similar to this case. There, as here, the VI Amendment ineffectiveness challenge was to a death sentence under the Florida death penalty statute, §921.141, Florida Statutes. Strickland involved a psychiatric defense as a mitigating factor under the same Florida statute; this case also turns upon a psychiatric defense which could have been presented at a Florida death sentence proceeding. Strickland decided that the Florida death sentencing proceeding, at issue in

this case, was sufficiently like a trial that for the purposes of describing counsel's duties under the VI Amendment, Florida's capital sentencing proceeding was like a trial. Strickland v. Washington, ___ U.S. ___, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Strickland controls this case because it describes counsel's duties under the VI Amendment. Strickland established a two-part test for VI Amendment ineffective assistance of counsel claims: (1) Performance - counsel must provide reasonably effective assistance; and (2) Prejudice - there must be a reasonable probability of a different result with effective assistance of counsel. Strickland v. Washington, ___ U.S. ___, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). A defendant must make

both showings in order to prevail on his VI Amendment ineffective assistance of counsel claims. Id.

Petitioner Elledge, in the view of this Court, has met the first requirement under the Strickland test; his counsel at the sentencing proceeding did not provide reasonably effective assistance of counsel. The evidentiary hearing was called by the Court on the narrow issue of whether the Petitioner met the prejudice prong of the two-part Strickland test. As the Supreme Court has recently reiterated, the VIII Amendment Cruel and Unusual Punishment clause compels a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. Caldwell v. Mississippi, ___ U.S. ___, ___, 53 U.S.L.W. 4743, 4744 (June

11, 1985).

To prevail on the prejudice prong, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, ___ U.S. ___, ___, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 699 (1984).

A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury below. As the Court explicitly defined the question which we must answer today:

When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of

aggravating and mitigating
circumstances did not warrant
death.

Strickland v. Washington, ___ U.S. ___,
___, 104 S.Ct 2052, 2069, 80 L.Ed.2d
674, 698 (1984).

Based upon the totality of the evidence - including a thorough review of all the previous state trial and appellate proceedings, as well as the testimony and evidence introduced at the evidentiary hearing before this Court - the Court concludes that there is not a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant Petitioner's death sentence. Therefore, the Petition must be denied.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIM REJECTED BECAUSE PREJUDICE
PRONG FOR INEFFECTIVE ASSISTANCE
OF COUNSEL NOT MET

As counsel for Petitioner correctly notes, Mr. Elledge's only plausible defense was that he did not intend in a fully deliberate and knowing way to kill Ms. Strack because Mr. Elledge suffered from severe mental and emotional disorder. If this defense could be proven, Mr. Elledge might succeed in establishing a mitigating circumstance under either Subsection 6(b) or Subsection 6(f) of Fla. Stat. §921.141. Subsection 6(b) defines as a mitigating circumstance: "The capital felony was committed under the influence of extreme mental or emotional disturbance." Subsection 6(f), the more plausible of the two under these facts, reads: "The capacity of the defendant to appreciate the crim-

inality of his conduct or to conform his conduct to the requirement of law was substantially impaired."

The facts of the Strack murder and rape on Saturday, August 24, 1974 -- as well as the murder of Edward Gaffney six hours later, early Sunday morning, August 25, 1974, and the murder of Mr. Kenneth Nelson, early Monday morning, August 26, 1974 -- are fully set out in the Florida Supreme Court's 1977 opinion in Elledge v. State, 346 So.2d 998 (Fla. 1977). The Court will not recite the details, except to agree with present counsel for Petitioner that the blind, cold, and deliberate appearance of Petitioner's behavior on the day of the homicide required some psychiatric defense if Elledge were not to receive the death penalty for the brutal murder of Ms.

Margaret Strack.

Yet, counsel presented a psychiatric defense without a psychiatrist, as present counsel for Petitioner accurately characterizes the performance of then-counsel for Petitioner at the August 1977 sentencing trial. Counsel presented no psychiatric testimony in mitigation at the sentencing trial and no background character testimony from family members in mitigation, but both kinds of witnesses were available for the August 1977 sentencing trial. At oral argument before this Court, counsel for the respondent conceded that a psychiatrist such as Dr. Dorothy Lewis, who testified in Dr. Ellsberg's defense during the evidentiary hearing before this Court, could have been located in 1977 to testify during the sentencing proceed-

ing before Judge Futch. Counsel presented only one defense witness, Mr. Elledge himself, who testified in a free-form manner regarding his unhappy childhood and alcohol and drug abuse. Mr. Elledge's family members, in addition to a psychiatrist, could have testified at the sentencing trial, thereby documenting William Elledge's brutal life experience as a battered and unloved child. Yet, no family members were even contacted by counsel.

Counsel's performance fell below the level found violative of the VII Amendment by the Eleventh Circuit in Tejlar v. Kemp, 755 F.2d 741, 744-745 (11th Cir. 1985). In Tejlar v. Kemp, counsel for the capital defendant at least interviewed family members before the sentencing trial. See also, King

v. Strickland, 748 F.2d 1462, 1463-1464 (11th Cir. 1984) (failure to present available character witnesses in mitigation during penalty stage of death case can violate VI Amendment). Unlike Thomas v. Wainwright, ___ F.2d ___ (11th Cir. 1985), Elledge's counsel's decision not to present background evidence was not defensible as a matter of trial strategy. In Thomas, counsel decided not to present evidence of the defendant's unsavory background in order to advance arguments consistent at the sentencing trial with those advanced at the guilt phase, that the evidence against the defendant was circumstantial and, therefore, the jury should hesitate to sentence a man to the electric chair where the defendant's guilt was in doubt. See, Thomas v. Wainwright, ___ F.2d ___,

___, (11th Cir. 1985). In Elledge's case, Petitioner's guilt was unquestioned. Sentencing was the sole matter at issue in August 1977 following the Florida Supreme Court's affirmance of Elledge's conviction and reversal of Petitioner's sentence. Sentencing trial counsel had no reason for his failure to present testimony from a psychiatrist or family members in mitigation of his sentence. An attorney has a duty to make a reasonable investigation; "the reasonableness of a decision on the scope of investigation will often depend upon what information the defendant communicates to the attorney." Mitchell v. Mass., 762 F.2d 885, 888-889 (11th Cir. 1985) (finding counsel's decision not to investigate or present mitigating background evidence reasonable). In this

case, there is no indication that Elledge did not fully inform his counsel regarding his background and family, which could have provided mitigating evidence if investigated and presented as testimony at the sentencing trial in 1977. Of course, the question remains whether the testimony presented at the evidentiary hearing before this Court -- which we find could have been presented in August 1977 if Elledge had received reasonably effective assistance of counsel -- meets the prejudice prong in Strickland v. Washington.

At the evidentiary hearing held before this Court, Ms. Connie Wright, Petitioner's older sister, and Mr. Daniel Elledge, one of Petitioner's younger brothers, testified in defense of their brother William Elledge. They testified

that counsel had not contacted either of them, or any other family member prior to the August 1977 sentencing proceeding. Further, they testified that they would have come from Oklahoma to Florida to testify on their brother's behalf if they had been asked.

Based on the sole testimony in mitigation of sentence given by the Petitioner himself, the trial judge found no mitigating circumstances that would prevent a death sentence for the murder of Margaret Strack. (Trial Record V, at 399)(August 2, 1977). The trial court provided Petitioner with free psychiatric examination by two psychiatrists, constitutionally compelled for indigents in death cases by the recent Supreme Court ruling Ake v. Oklahoma, ___ U.S. ___, 53 U.S.L.W. 4179 (February 26, 1985).

The psychiatrists each gave damaging evaluations, to the effect that Petitioner did not commit the Margaret Strack murder while under the influence of extreme mental or emotional disturbance, that Mr. Elledge was sane, and Mr. Elledge understood and appreciated the nature and consequences of his acts at the time of the homicide.

The trial court found no mitigating circumstances, but found three aggravating circumstances. The court found that Mr. Elledge's murder of Margaret Strack was: (1) a capital felony during the commission of a rape, Fla. Stat. §921.141(5)(d); (2) a capital felony committed for the purpose of avoiding arrest, Fla. Stat. §921.141(5)(e); and (3) a capital felony that was especially heinous, atrocious and

cruel, Fla. Stat. §921.141(5)(h). See, Trial Record V at 398-399. The trial court balanced no mitigating circumstances against three aggravating circumstances and concluded that death was the appropriate sentence Mr. Elledge should receive for the first degree murder of Margaret Strack.

The aggravating circumstances in the Strack homicide committed by Mr. Elledge are extreme, and amply supported by the record, including Petitioner's own statements. Further, as factual findings of a state trial court, restated and upheld by the highest state appellate court, they are presumed to be correct. See, 28 U.S.C. §2254(b) and Sumner v. Mata, 449 U.S. 539 (1981). Given the atrocious and cruel nature of this violent murder, only the most con-

vincing evidence in support of mitigating circumstances could create a "reasonable probability ... that the balance of aggravating and mitigating circumstances did not warrant death."

Strickland v. Washington, ___ U.S. ___,
___, 104 S.Ct 2052, 2069, 80 L.Ed.2d
674, 698 (1984). See, William v. Maggio,
737 F.2d 1372, 1394 (5th Cir. 1984)

(statements by other defense witnesses who merely told more about the defendant's troubled adolescence and mental condition would not have changed the result that defendant deserved death for murder of rape victim, where evidence presented by state in aggravation included confession by defendant describing how victim was repeatedly stabbed in the throat, and defendant showed little remorse for his crimes).

Petitioner's chief witness at the evidentiary hearing before this Court was Dr. Dorothy Otnow Lewis, an eminent psychiatrist currently a Professor at New York University Medical School and Professor of Clinical Medicine at Yale Medical School. Dr. Lewis received her undergraduate degree from Harvard and her medical degree from Yale. She is the author of numerous scientific works in the field of psychistry, including two chapters in a leading psychiatric text on antisocial behavior; the Chapters are entitled "Conduct Disorder and Juvenile Delinquency" and "Adult Antisocial Behavior and Criminality." Petitioner's Exhibits 10 & 11. At the hearing, Dr. Lewis testified that adults who commit violent acts such as homicide frequently have central nervous system

disorders, a history of severe head injuries, an adverse childhood environment in a violent, abusive family, and genetics of mental disorder, especially a psychotic first-degree relative. She believed William (Bill) Elledge suffered all of these symptoms. However, she did not find in Mr. Elledge another frequent characteristic, very low I.Q., bordering on the retarded, from 70 to 80 on the I.Q. scale. Mr. Elledge seemed to be of above average intelligence. She did not disagree with tests in Mr. Elledge's medical records which indicated his I.Q. at 104 (100 as average I.Q.).

Dr. Lewis interviewed Mr. Elledge three times at the Florida prison in Starke. The interviews lasted approximately three hours each, and were conducted in late 1982 and early 1983, ap-

proximately eight and a half years after the Strack murder. She interviewed Mr. Elledge's mother once by telephone.

Based on this investigation, and review of various medical reports conducted earlier and upon Mr. Elledge's confessions, she wrote a report in 1983 which is attached as Exhibit C to the Appendix to the Amended Petition for the Writ of Habeas Corpus, filed in this action.

Dr. Lewis interviewed Connie Wright and Daniel Elledge for approximately one hour each on the morning of the first day of the evidentiary hearing, July 2, 1985.

Dr. Lewis concluded that Petitioner suffers from organic brain disfunction, episodic rages, and paranoid behavior. Dr. Lewis believes that Mr. Elledge becomes especially violent when he feels

teased, tricked, or in danger. She emphasized that, in her view, the combination of brain damage, witnessing extraordinary family violence, psychotic paranoia, and child abuse produced the disorder that affected Mr. Elledge during the Strack homicide. She felt that Mr. Elledge's disorders caused a rage at the time of the homicide that was ungovernable and beyond his control.

Dr. Lewis was a very credible witness and the Court has no reason to question the sincerity of her diagnosis. She regards Mr. Elledge's murder and rape of Margaret Strack as the psychotic reaction of a person who is organically brain-damaged. Yet, as counsel for Respondent pointed out in their cross-examination of Dr. Lewis and in closing argument, her diagnosis of organic brain

damage is contrary to the diagnosis of all the other psychiatrists who have examined Mr. Elledge, including the doctors who examined him closest in time to the Strack murder. Counsel for the parties have provided the Court with Petitioner's medical records by all examining psychiatrists, Petitioner's Army records, records from the California Youth Authority, the Colorado State Hospital, as well as the statements and drawings by the Petitioner. The Court has been unable to find conclusive support for Dr. Lewis' diagnosis.

Dr. Lewis could have provided the strongest evidence in favor of mitigation if she had diagnosed Mr. Elledge as insane. However, she stated that she does not believe Mr. Elledge is insane, in that respect, agreeing with the other

doctors who examined Mr. Elledge and found him fully competent to stand trial. Nor could Dr. Lewis state that Mr. Elledge suffered from epilepsy, although she felt that he might have experienced some form of psycho-motor seizure after the Strack homicide. This hypothesis was substantially undermined during cross-examination. The facts in Mr. Elledge's own contemporaneous statements -- as well as his disposal of the body of Margaret Strack shortly after the crime and Mr. Elledge's murder of Edward Gaffney six hours after the Strack homicide -- do not support the theory that Petitioner experienced an epileptic seizure which caused him to murder Margaret Strack.

Although the testimony of Connie Wright corroborated the facts of Mr.

Elledge's terrible childhood of abuse and beatings, it undermined some of the conclusions in Dr. Lewis' report. In her report, Dr. Lewis stated that Bill Elledge was "forced to stimulate his sister Connie sexually" when Bill was nine years old, that the "sexual relationship with his sister continued throughout childhood," and that Bill's "first experience of intercourse was with his sister." Report, Appendix to Amended Habeas Petition, at C-3. Connie Wright flatly denied all allegations of an incestuous relationship with her brother Bill. She testified that Bill attempted to assault her when she was fourteen years old (and Bill was twelve and a half), but that her father interceded and dragged Bill away. She denied any other sexual contact, or attempted

sexual contact, with her brother. The Court, based on its view of the credibility of Ms. Connie Wright, concludes that her version is probably closer to the truth than the version in Dr. Lewis' Report. While this tale of incest does not cast doubt upon the credibility of Dr. Lewis, it does cast substantial doubt upon the data Mr. Elledge told Dr. Lewis -- the data upon which Dr. Lewis based her Report and diagnosis.

Additionally, Connie Wright and Danny Elledge testified extensively regarding Bill's violent temper as a child. Connie and Danny stated that he was frequently violent towards them. In one particular incident recounted by both of them, Bill is remembered as violent and dangerous. One night the parents, who were leaving the house to go to a bar,

told Connie to keep Bill out of the garage where their father kept his television repair shop. The father feared Bill would destroy the shop and his equipment. Bill was about 15 years old at the time, Connie was about 17 and Danny was approximately 9. As soon as their parents left, Bill attempted to get into the garage. When Connie tried to stop Bill, Bill smashed his father's guitar over Connie's head. Danny chased Bill away by breaking off a soft drink glass bottle and threatening him. Connie recalled that Bill seemed "murderous," "strong and screaming," in a spell of extreme anger like their mother.

Danny Elledge testified to the violent childhood environment -- the continual beatings and humiliations which

their mother subjected all the children. Danny said that he was an abused child, as were all six of the children. He agreed with Connie that Bill received the worst of the abuse. Danny stated that there was no way to stop their mother when she started -- she used belts, metal hangers, or whatever object she could find to beat her children. Their father was the only person who could physically restrain the mother from attacking the children, which she did without any reason whenever she became angry. Danny testified that his father was a good man, who struggled to keep the family together and provided what little love and affection there was in the household. On cross-examination, Danny testified to various robberies and burglaries committed by Bill when he was

a child. Danny said that Bill is "a mean guy, he can be mean."

Although Connie and Danny's testimony documented Bill's tortured childhood, they also presented a picture of the Petitioner as a violent, aggressive, and dangerous person even when he was a child. Further, their presence as normal, law-abiding citizens, despite the abuse they suffered as children from their mother in a hellish household, might have served to hurt, rather than help the Petitioner's defense of mitigation. Connie and Danny have been able to lead responsible lives -- undermining Petitioner's claim that he should not be held fully responsible for his acts.

At the evidentiary hearing, one witness was called who unquestionably would have hurt Petitioner's defense,

Officer Kenneth Roach. Officer Roach was one of the first officers who questioned Petitioner after his arrest in Jacksonville. Respondent's counsel convincingly demonstrated on cross-examination that calling Roach as a witness would inevitably have led to bringing out the facts of the third homicide -- the Gaffney homicide in Hollywood. The Florida Supreme Court reversed the first death sentence because of the mention and consideration in sentencing of the Gaffney homicide. If Roach had been called at the August 1977 sentencing proceeding, the advisory jury and the sentencing judge would have had three homicides committed in quick succession to consider in sentencing Mr. Elledge for the murder of Margaret Strack. The additional damaging evidence would also

have undermined what little claim of remorse for the Strack homicide which Petitioner could present.

V. CONCLUSION

In conclusion, the Court returns to the analysis in Strickland, in its review of the ineffective assistance of counsel at sentencing claim. As in Strickland, the aggravating circumstances in this case are utterly overwhelming. The proposed psychological evidence, despite the earnest and professional presentation by Dr. Lewis, would have been of little help to Petitioner. The admission of some of the evidence the Petitioner now seeks to enter for consideration might even have been harmful to his case. As the Court concluded in Strickland, this Court must now conclude in regard to Mr. Elledge's

petition: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed."

Strickland v. Washington, ___ U.S. ___, 104 S.Ct 2052, 2071, 80 L.Ed.2d 674, 701 (1984). Therefore, the Petition for the Writ of Habeas Corpus must be DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 5th day of September, 1985.

(s) Edward B. Davis
EDWARD B. DAVIS
United States District Judge

cc: Richard H. Burr, III, Esq.
Penny H. Brill, Esq.

SUPREME COURT OF FLORIDA

No. 52,272

WILLIAM DUANE ELLEDGE,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

[October 22, 1981]

PER CURIAM.

This appeal is before us from a jury and judge resentencing of appellant to death, entered upon a plea of guilty. The original death sentence was vacated because of improper consideration as an aggravating factor of a collateral felony for which Elledge at the time had not been convicted. Elledge v. State, 346 So.2d 998 (Fla. 1977) [Elledge I].

The facts surrounding appellant's

convictions for first-degree murder and rape of Margaret Strack are detailed in our first review of appellant's death sentence, and do not require rehashing. It is sufficient to note that Elledge confessed to a weekend of crimes which included the rape and murder of Ms. Strack, the robbery and murder of Edward Gaffney, and the robbery and murder of Kenneth Nelson. This Court vacated appellant's ensuing death penalty for the Strack murder. Although details of the Nelson murder, for which appellant had been convicted before sentencing, were admissible to support the aggravating circumstances of having a previous capital or violent felony conviction, details of the Gaffney murder, for which appellant had not been convicted at the time of sentencing, were not allowable.

Elledge I at 1001-03.

On this appeal appellant attacks his second death sentence on sundry grounds, all of which we have considered, but only five of which warrant discussion.

Appellant first complains that the limited testimony as to the Gaffney murder was not allowable under the literal dictates of our previous opinion in this case. Elledge I at 1003. But the entire thrust of our prior decision was the distinction between felony convictions, which were allowable to prove the corresponding aggravating factor, and a charge for such a crime which was not allowable. Our concern was that the requirements of Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), be met. Provence re-

quires that a conviction is essential for consideration of prior crimes under the aggravating factor in section 921.141(5)(b), Florida Statutes (1977).¹ Yet it is clear from the record that prior to the resentencing trial, Elledge had indeed been convicted for the Gaffney murder. In Elledge I we made clear that evidence of convictions for certain felonies is admissible, including testimony of witnesses, "because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." *Id.* at 1001. We

¹ Section 921.141(5)(b), Florida Statutes (1977), reads: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

are at a loss to understand how appellant could claim that evidence of the Gaffney murder is forever barred despite an ensuing conviction in light of the reasoning in Elledge I.

Appellant asserts that his appearance before the sentencing jury in leg irons led to prejudice in the jury's mind. Cases which concern such prejudice deal with the adverse effects that such restraints have upon the accused's presumption of innocence. See, Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir. 1973), cert. denied, 416 U.S. 959 (1974). But appellant did not stand before the sentencing jury as an innocent man; rather he stood as a confessed murderer of three persons. The critical issue in a restraint case is the degree of prejudice caused by the restraints. Here, we

can find very little prejudice since the Appellant was an avowed dangerous individual. See, United States ex rel. Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir.), cert. denied, 411 U.S. 971 (1973). Second, such restraints are within the sound discretion of the court, and the record indicates the judge had information that the appellant had threatened to attack the bailiff. Elledge through his confessed acts had proven himself a man of his word when violence was threatened, so we would be hard pressed to find the trial court abused its discretion in taking such precautions.

Appellant next asserts that an aggravating circumstance, that the murder was committed to avoid arrest, found by the judge was unsupported by the evi-

dence. This argument is unfounded for a close examination of the record reveals that Elledge's taped confession and a transcript of that confession were admitted into evidence.² During this confession Elledge detailed the victim's threats to call the police when he initiated the rape. Such evidence is sufficient to support the conclusion that Elledge killed the rape victim in order to prevent her carrying out her threat.

Appellant attacks the sentencing order³ because he claims the trial judge

² State's Exhibit No. 5.

³ The order reads in part:

On August 3rd, 1977 the jury recommended to this Court that WILLIAM DUANE ELLEDGE be sentenced to death.

Pursuant to law, this Court makes the following findings of fact:

- (1) The Defendant does have a significant history of prior criminal activity. The Defendant has been convicted of Murder In The First

included under his initial finding,

Degree in Jacksonville, Florida. He has also been convicted of felonious assault in the State of Colorado. This Defendant has been confined in various institutions for a great portion of his life for various other crimes.

(2) The Defendant did not commit this Murder while under the influence of extreme mental or emotional disturbance. The Defendant was examined by two psychiatrists and both stated that at the time of the crime the Defendant understood and could appreciate the nature and consequences of his acts. Neither Doctor found nor reported that the Defendant was acting under the influence of extreme mental or emotional disturbance at the time of the crime. There was no indication of insanity.

(3) The victim was not a willing participant in the Defendant's conduct and did not consent to these crimes.

(4) This murder was committed while the Defendant was raping the victim or shortly after raping the victim. The murder was committed for the purpose of avoiding arrest, as the victim had threatened to notify the police of the rape and after this threat by the victim, the Defendant committed this murder.

(5) This murder was especially

which stated that Elledge had a signifi-

heinous, atrocious and cruel. The Defendant choked the victim until she was beating on the wall and gasping for air. He then threw her from the bed onto the floor and again choked her for approximately 15-20 minutes. During this period of time the Defendant was raping the victim.

After the rape and murder were completed, the Defendant then dragged the body of the victim to the door of the motel room, threw her down the steps and dragged her to an automobile. The Defendant then drove her to a church parking lot and threw her from the car. The Defendant then abandoned her almost nude body, with the legs tied together by an electric cord, in the church parking lot.

Based upon these findings of fact, and based further upon the advisory sentence rendered to this Court by the twelve member jury, and it being the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court, being of the additional opinion that NO mitigating circumstances exist,

It is therefore the sentence of this Court, having already adjudged you to be guilty of Murder In The First Degree on March 17th, 1975,

cant history of criminal activity, crimes which were either noncapital or nonviolent.⁴ Such an argument is clearly obfuscatory as it is apparent that this initial finding concerned the lack of the mitigating circumstances under section 921.141(6)(a), Florida Statutes (1977),⁵ because the findings that directly follow the initial finding also concern lack of mitigating circumstances. The trial judge properly differentiated mitigating from aggravating circumstances in negating the statutorily described

that you,

WILLIAM DUANE ELLEDGE, be sentenced to Death.

⁴ Appellant seeks to characterize the initial finding as the aggravating circumstance under section 921.141(5)(b), Florida Statutes (1977), which concerns prior convictions for capital or violent felonies.

⁵ "The defendant has no significant history of prior criminal activity."

mitigating circumstance.

Finally, appellant claims that the trial judge limited jury consideration of nonstatutory mitigating circumstances by giving the standard jury instruction which states: "The mitigating circumstances which you may consider, if established by the evidence, are these..." We have previously considered this argument in depth and have flatly rejected it. See, Peek v. State, 395 So.2d 492, 496-97 (Fla. 1980), cert. denied, 101 S. Ct 2036 (1981). See also, Demps v. State, 395 So.2d 501, 505 (Fla. 1981).

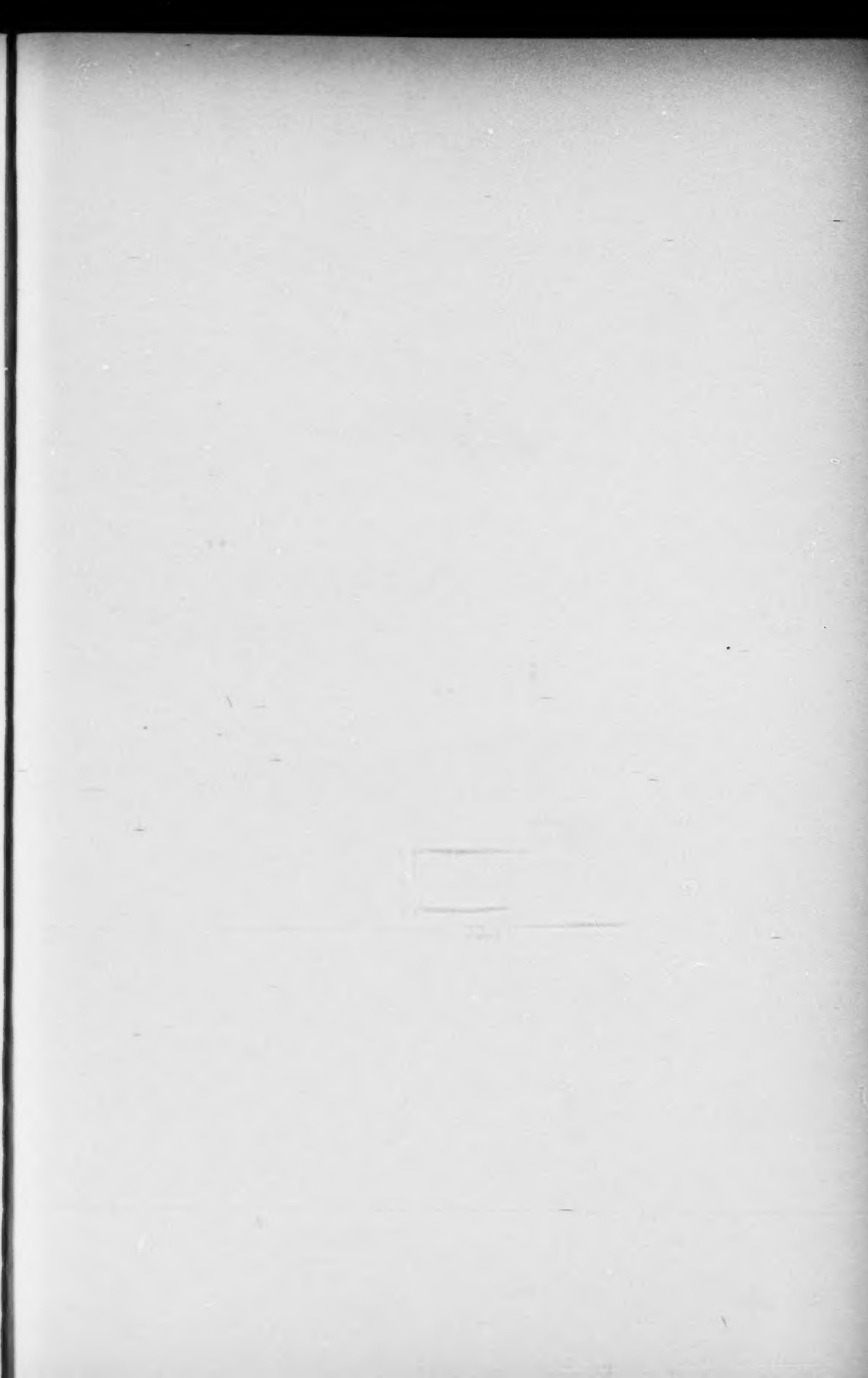
Having found no merit in any of appellant's arguments, and having conducted a full review of the sentence which found several aggravating and no mitigating circumstances, we are unable to discern any error that may have deprived

appellant of any protections offered by the judicial process. Accordingly, the sentence of death is affirmed.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE RE-HEARING MOTION AND, IF FILED, DETERMINED.



ORIGINAL

No. 87 - 1234

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RICHARD L. DUGGER, Secretary
Florida Department of Corrections,
Petitioner,

- v -

WILLIAM DUANE ELLEDGE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

In ruling that the shackling of Mr. Elledge during his capital sentencing proceeding was "inherently prejudicial" in the peculiar circumstances of his case, and that he was thus entitled to the protections of due process before being tried in shackles, has the Eleventh Circuit done anything more than faithfully apply the Court's ruling in Holbrook v. Flynn, 106 S.Ct. 1340 (1986), in which the Court recognized that shackling is "inherently prejudicial" because of its tendency to impute dangerousness and untrustworthiness to the defendant without the necessity of proof, and that for this reason, "close judicial scrutiny" must be given before one can be subjected to trial in shackles?

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COUNTER-STATEMENT OF THE CASE

Respondent writes briefly to correct certain misimpressions conveyed by Petitioner's Statement of the Case. This is a rare case, in which the trial court ordered that a capital defendant be shackled during his capital sentencing trial based on third party hearsay, without affording the defendant an opportunity to be heard. Upon announcement by the trial court of its decision specific objections were made but were summarily ignored by the Court:

THE COURT: I received information from Chief Miro yesterday, the Chief of Detention for the Broward Sheriff's Office.

He told me he received information from two of the Lieutenants -- one in the jail, and one in the Detective Division -- that Mr. Elledge had become a karate expert, while in prison -- apparently; and he was going to attack my Bailiff, either on the way to the courtroom or in the courtroom, today, because he had nothing to lose -- he is now serving two life sentences, plus fifty years for rape; and he is facing a death penalty, or another life sentence, arising out of this situation; that he has been adjudged guilty of these particular crimes.

In abundance of precaution, I entered an Order to leave Mr. Elledge in leg irons here in these proceedings.

MR. MCCAIN: For the record, the defense would object to it in the presence of the jury, having the belief it would unduly influence and prejudice the jury against the defendant.

THE COURT: Fine. I think we ought to put it on the record.

THE DEFENDANT: May I say something, your Honor.

THE COURT: No, sir. We will be in recess.

4C-11.¹ Not only did counsel make a specific objection, but when Mr. Elledge himself asked permission to speak on the issue he was denied that right. Thereafter, the court recessed with no further discussion concerning the inherently prejudicial impact of shackling during a capital sentencing.

¹ Citations to the record before the Eleventh Circuit are in the form prescribed by the Eleventh Circuit. If preceded by "R," the citations are to the record, followed by the record volume number, the item number on the Eleventh Circuit docket sheet, and the page numbers (as internally numbered) within the document. If preceded by a number, the citations are to the record exhibits, as numbered and designated by the Eleventh Circuit, followed by the page numbers (as internally numbered) within the exhibit.

To the extent that other material facts need to be highlighted, they are highlighted within the arguments presented herein.

SUMMARY OF ARGUMENT

1. Mr. Elledge was ordered to be shackled in leg irons during his capital sentencing jury trial without being afforded the opportunity to be heard as to the perceived need for such a measure or as to the prejudice he would suffer from it. Ruling that the shackling of Mr. Elledge was "inherently prejudicial" in the circumstances of his case, and that he was entitled to the protections of due process before being subjected to a capital sentencing trial in shackles, the Eleventh Circuit did no more than apply the Court's settled principles of analysis to this matter. The Eleventh Circuit ruled that the "inherent prejudice" found applicable by the Court to guilt/innocence trials applies to capital sentencing trials where shackling's plain message-- "that the defendant is dangerous or untrustworthy," Holbrook v. Flynn, ___U.S.____, 106 S.Ct. 1340, 1346 (1986) -- cuts to the heart of the character analysis that is the essence of the life or death decision, solely on the basis of "circumstances not adduced as proof at trial." 106 S.Ct. at 1345. In this case "close judicial scrutiny" was not undertaken and no "essential state interest" was demonstrated, because the hearsay rumor relied upon by the judge for ordering shackling was not shown to be accurate, and the judge summarily refused Mr. Elledge's request to be heard in opposition to the shackling order. No significant, unsettled principle of law would be clarified, or conflicting lower court decisions resolved, by the Court's review of this question.

2. The final judgment of the Court of Appeals was correct as well, because the court should have granted the writ on the basis of the same error for which the Court unanimously granted relief in Hitchcock v. Dugger, ___U.S.____, 107 S.Ct. 1821 (1987). Consistent with the authoritative pre-Lockett application of the Florida capital sentencing statute, the trial judge here

constricted his and the jury's consideration of the mitigating features of the case to the statutory mitigating circumstances. The substantial nonstatutory mitigating evidence presented by Mr. Elledge was therefore not considered by the sentencer. There is no principled basis -- nor did the Eleventh Circuit find that there was -- for distinguishing Elledge from Hitchcock.

3. The final judgment of the Court of Appeals was correct as well, because the court should have granted the writ on the basis of Mr. Elledge's claim of ineffective assistance of counsel. Mr. Elledge claimed that he was deprived of effective assistance of counsel in his sentencing proceeding because of his attorney's unreasonable failure to investigate and present a psychiatric mitigation defense, which was his only defense against the death penalty. In Mr. Elledge's view, reasonable counsel would have sought the assistance of a competent psychiatrist and interviewed members of the family in order to demonstrate that he suffered from psychosis, brain damage, and the effects of an abused and battered childhood at the time of the homicide. Even though the Eleventh Circuit determined that the "performance" prong of Strickland v. Washington's ineffective assistance of counsel standard had been satisfied, it held that Mr. Elledge failed to demonstrate sufficient prejudice to warrant relief under Strickland for two reasons: his failure to show that if counsel had conducted a reasonable investigation he would have found a favorable psychiatrist, and his failure to convince the district judge that the psychiatric mitigating evidence would have outweighed the aggravating factors in this case. The Eleventh Circuit erred in its reasoning, because its first reason was flatly contradicted by the record, and its second reason misapplied Strickland's prejudice standard by approving the district judge's subjective assessment of the mitigating evidence as if he were the sentencer, rather than requiring that the evidence be assessed from the perspective of a reasonable juror. Had the record been read accurately and had the proper standard for assessing the effect of the unrepresented mitigating evidence

been applied, the Eleventh Circuit would have concluded that Strickland's prejudice showing had been satisfied.

REASONS FOR DENYING A WRIT OF CERTIORARI

I.

THE COURT OF APPEALS' DECISION THAT SHACKLING MR. ELLEDGE IN IRONS BEFORE THE JURY IN HIS CAPITAL SENTENCING TRIAL DENIED A FAIR TRIAL ON THE ISSUE OF PUNISHMENT AND DUE PROCESS OF LAW IS CORRECT AND PRESENTS NO ISSUE CALLING FOR REVIEW BY THE COURT.

Mr. Elledge was shackled in irons throughout his capital sentencing trial before the jury. Dugger's attack on the Eleventh Circuit opinion is based upon the faulty premise that a capital defendant can have no interest that could be undermined by being forced to trial for his life while chained in irons. Dugger's extreme position would mean that every defendant in every courtroom in America could be chained down before the jury determining his sentence.

The Eleventh Circuit followed a simple middle ground that is easily applied and consistent with other areas of the law where interests compete. The Court of Appeals established no per se rule, nor did it hold shackling to be forever forbidden. It simply said that if the defendant is to be shackled in irons before the jury, the judge must first give the defense an opportunity to challenge the basis of that decision if he asks to do so. This makes perfect sense. It burdens no one and does not threaten or ignore security needs.

In this case the judge announced his decision to keep Mr. Elledge in irons, relying on what essentially was three step hearsay. Defense counsel objected on the basis that the shackling would be prejudicial, and Mr. Elledge asked to speak, but the judge summarily refused that request. There was no hearing and thus no testing or corroboration of the treble hearsay used by the judge to sua sponte shackle Mr. Elledge. The irons were clamped down with no way of knowing truthfully whether Mr. Elledge had "become a Karate expert, while in prison" or had told someone he was going to attack a bailiff on the way to court. Mr. Elledge could have rebutted that hearsay but was refused the opportunity to do so. Mr. Elledge was chained down

on the basis of rumor, no more, and rebuffed in his attempt to contradict that rumor.

The Court of Appeals chose a reasonable course without the dire consequences posed by Dugger.² Courtroom security is not threatened, nor is it much burdened by a procedure permitting a defendant a due opportunity to oppose his chaining.

The Court of Appeals recognized that "shackling" a defendant at trial is the "sort of inherently prejudicial practice that ... should be permitted only where justified by an essential state interest specific to each trial." Holbrook v. Flynn, ___ U.S. ___, 106 S.Ct. 1340, 1346 (1986). A-53; 823 F.2d at 1451. Further, this inherently prejudicial practice "pose[s] such a threat to the 'fairness of the fact-finding process' that [it] must be subjected to 'close judicial scrutiny.'" Id. at 1345 (quoting Estelle v. Williams, 425 U.S. 501, 503-504 (1976)). Here, Mr. Elledge was shackled during his sentencing trial, but he was refused even the most minimal hearing on whether there was a factual basis to justify this inherently prejudicial security measure. Because this security measure was as "inherently prejudicial" in his sentencing trial as it would have been in a guilt-innocence trial, the trial court's failure to determine that it was in fact justified by an essential state interest deprived Mr. Elledge of the fair sentencing determination guaranteed by the Eighth Amendment and the Due Process Clause.

² The dissent below and petitioner herein have argued that the majority established a per se rule. That argument misreads the opinion below. What the Court of Appeals said was that in some cases shackling the defendant might have a neutral effect or even a beneficial effect on the jury. A-50; 823 F.2d at 1450. In some cases, however, shackling can serve as "first hand evidence of future dangerousness and uncontrollable behavior." Id. It was only on this question of help versus harm that the Court of Appeals said a case-by-case analysis was inappropriate. Id. It said that the constitutional test established by this Court for shackling a defendant should be followed when shackling is proposed, without resorting to guesswork as to whether shackling could actually help the defense. This approach too makes sound sense since, if chaining the defendant is actually helpful to the defense, it presumably will not be objected to by the defense. In any event, all the Court of Appeals said was that "close judicial scrutiny" must be given whenever shackling is proposed, and that in this case since any challenge was rebuffed there was no such scrutiny and there could not be because the facts are unproven and and untested.

At the commencement of Mr. Elledge's resentencing trial the trial judge announced for the record that he had sua sponte entered an order requiring that Mr. Elledge be shackled in leg irons throughout the trial. 4C-11. The judge's reason for this action was the rumor

that Mr. Elledge had become a Karate expert, while in prison -- apparently; and he was going to attack my Bailiff ... on the way to the courtroom, today, because he had nothing to lose....

Id. The "information" upon which the judge based his order was double or triple hearsay, for it had been relayed to him by the chief of detention of the sheriff's office, who in turn had received the information from two lieutenants in the sheriff's office. Id. Where those lieutenants received such information is unknown. None of the alleged sources of this information was brought forward to testify or in any way substantiate the bare allegation. And even though defense counsel objected to the judge's order, and Mr. Elledge personally requested to be heard concerning the order, he refused to hear from Mr. Elledge or to conduct any evidentiary inquiry into the basis for the order. Id.

The question raised by Dugger is whether shackling during a capital sentencing trial is governed by the Fourteenth Amendment standards that govern such a practice in a guilt/innocence trial. Since Mr. Elledge was no longer presumed to be innocent, Dugger reasons, he had no interests at stake in the capital sentencing trial. Dugger reasons therefore that constitutional principles do not apply. Apart from the broad sweep of that reasoning -- permitting every capital defendant to be paraded in irons at sentencing under the logic that he is no longer presumed innocent -- such reasoning misperceives both the nature of the capital sentencing determination and the scope of the "inherent prejudice" identified as threatening the due process right to a fair trial. "[T]he question must be ... whether 'an unacceptable risk is presented of impermissible factors coming into play.'" Holbrook v. Flynn, 106 S.Ct. at 1347 (quoting Estelle v. Williams, 425 U.S. at 505).

A capital defendant has a right guaranteed by "the Due

Process Clause of the Fourteenth Amendment ... [to] a fair trial on the issue of punishment." Green v. Georgia, 442 U.S. 95, 97 (1979). Thus, even though a capital defendant does not retain a "presumption of innocence" at the capital sentencing trial, he does retain the important due process right of having his sentence "determined solely on the basis of evidence introduced at trial, and not on grounds of official suspicion ... or other circumstances not adduced as proof at trial.'" Holbrook v. Flynn, 106 S.Ct. at 1345 (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).³

While a defendant may not be presumed innocent at his capital sentencing trial, he is accorded a presumption that life is the appropriate sentence, that does not leave him "unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death." § 775.082(1), Fla. Stat. (1977). The capital sentencing trial under Florida law "resemble[s] and, indeed, in all relevant respects [is] like ... [a] trial on the issue of guilt or innocence. It [is] itself a trial on the issue of punishment." Bullington v. Missouri, 451 U.S. 430, 438 (1981). This is so because the state is assigned "the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative [punishments]." Id. A capital sentencing trial therefore has all of "the hallmarks of the trial on guilt or innocence." Id. at 439.⁴

³ This due process mandate is echoed by the Eighth Amendment restrictions applicable to capital sentencing. Because of the greater need for reliability in the determination of sentence in a capital proceeding, due process requires that "any evidence on which the jury might have relied" as an aggravating factor "[be] properly adduced at the sentencing hearing and ... fully subject to explanation by the defendant." Zant v. Stephens, 462 U.S. 862, 887 (1983). See also Gardner v. Florida, 430 U.S. 349 (1977).

⁴ Every major feature of the Missouri penalty trial relied on in Bullington is also present under the Florida procedure: the clear-cut choice between only two sentencing alternatives; the requirement that the jury base its choice upon the evidence, guided by detailed legal standards; the requirement that the state prove the proffered aggravating circumstances beyond a reasonable doubt; the presentation of evidence by both

Before a death sentence can even be considered by the jury or judge in Florida, therefore, the state must prove two "elements," State v. Dixon, 283 So.2d at 9: first, that at least one statutory aggravating circumstance exists beyond a reasonable doubt, and second, that the aggravating circumstances outweigh the mitigating circumstances. Arango v. State, 411 So.2d 172, 174 (Fla. 1982). These are "threshold" matters of proof -- the burden of which Arango holds must be borne by the state -- before the sentencer can even consider whether to recommend or impose a death sentence. See Barclay v. Florida, 463 U.S. 939, 961-63 (1983) (Steven, J., joined by Powell, J., concurring). If the state fails to carry this burden in Florida, a life sentence must be imposed. Id. at 962 n.4. Just as the assignment of the burden of proof to the state in the guilt phase of the trial corresponds with the presumption of innocence accorded the defendant, see Sandstrom v. Montana, 442 U.S. 510, 522-24 (1979); In re Winship, 397 U.S. 358, 363-64 (1970); Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 404-405 (1895), the assignment of the burden of proof to the state in the capital penalty trial corresponds with -- and indeed protects -- the presumption that, before the state carries its burden, the proper sentence is life, not death.⁵

Shackling is "inherently prejudicial" because it erodes the presumption that life is the appropriate sentence -- not "on the basis of evidence adduced at trial," Holbrook v. Flynn, 106 S.Ct. at 1345, but on the basis of "'circumstances not adduced as proof at trial.'" Id. Shackling the capital defendant in the sentencing trial cuts to the heart of the jurors' life and death inquiry, for it "create[s] the impression in the minds of the

sides; opening and closing arguments by counsel; jury deliberations; and a formal verdict. Compare Bullington, 451 U.S. at 438 & n.10, with § 921.141(1) & (2), Florida Statutes; Florida Rule of Criminal Procedure 3.780; State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

⁵ The "use of the reasonable-doubt standard indicates that in the capital sentencing proceeding, it is the state, not the defendant, that should bear 'almost the entire risk of error.'" Bullington, 451 U.S. at 446 (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).

jury that the defendant is dangerous or untrustworthy." Holbrook v. Flynn, 106 S.Ct. at 1346 (quoting Kennedy v. Cardwell, 487 F.2d 101, 108 (6th Cir. 1973)) (emphasis supplied).

The questions of dangerousness and trustworthiness are just as much at issue in a capital sentencing trial as in a guilt/innocence trial -- even more so where jurors attempting to decide life or death may find assessment of the danger posed by the defendant to be a key inquiry.⁶ Without the introduction of any evidence of dangerousness by the prosecution, however, the appearance of the defendant in shackles quite clearly tells the jury that the appropriate sentence is death because the defendant cannot be trusted to refrain from dangerous conduct in the present, much less in the future. As noted in Kennedy v. Cardwell,

When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers.

487 F.2d at 105-106 (quoting State v. Kring, 64 Mo. 591, 593 (1877)).⁷ There can be no genuine question therefore that the

⁶ As the Court has recognized:

Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted persons' probable future conduct when it engages in the process of determining what punishment to impose."

Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986) (quoting Jurek v. Texas, 428 U.S. 262, 275 (1976)). Moreover, the prediction of "probable future behavior" can cut either way. If the prediction is of future dangerousness, it will be aggravating. See Barefoot v. Estelle, 463 U.S. 880 (1983); California v. Ramos, 463 U.S. 992 (1983). But if the prediction is "that the defendant would not pose a danger if spared (but incarcerated) [it] must be considered potentially mitigating." Skipper v. South Carolina, 106 S.Ct. at 1671 (footnote omitted).

⁷ While simply and effectively conveying such a message about the defendant, shackling thus mounts a general assault on character -- the essential issue. As the Florida court emphasized in Mr. Elledge's own case, "the purpose for considering [evidence of] aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the death penalty is called for in his or her particular case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977) (emphasis supplied). The prosecutor here

appearance of Mr. Elledge shackled in irons at his sentencing trial flatly contradicted the presumption operative at that point -- that the State was required to overcome by the introduction of evidence -- that life was the appropriate sentence for him.⁸

The Court of Appeals also recognized another important consideration in shackling criminal defendants in American courtrooms. Apart from the "significant effect on the jury's feelings about the defendant ... this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." A-52-53; 823 F.2d at 1451 (quoting Illinois v. Allen, 397 U.S. 337, 344 (1970)). In short it is not a decision to be lightly made. The summary authority sought by Dugger fails to acknowledge the importance of that decision.

Accordingly, the shackling of Mr. Elledge throughout his sentencing trial was as "inherently prejudicial" as it would have been in a guilt/innocence trial, and is thus governed by the due process requirements of a fair trial. The Court of Appeals was correct in holding that to justify the shackling of Mr. Elledge, the state must show an "essential state interest" compelling such an extreme action, and that practice must be subjected to "close judicial scrutiny." Holbrook v. Flynn, 106 S.Ct. at 1345.

The Court of Appeals found that under the procedures in this

was favored by an assault on Mr. Elledge's character, without the necessity of introducing evidence.

⁸ As we have shown, therefore, it is no answer to say that the appearance of Mr. Elledge in shackles was harmless because he already stood convicted of homicide. While the state could have argued that Mr. Elledge was dangerous and likely to be so in the future solely on the basis of his past convictions, the prediction of dangerousness solely on this basis is unreliable and easily countered. See Barefoot v. Estelle, 463 U.S. at 896-902. In order to have presented compelling evidence of future dangerousness -- particularly where as here the defendant proffered evidence of his remorse and commitment to rehabilitation, see 5C-337-343, evidence of his future non-dangerousness -- the state would have had to present additional evidence, beyond the mere fact of prior convictions. The appearance of Mr. Elledge in shackles gave the state just such evidence, however, relieving it of the burden to produce it. For this reason the shackling of Mr. Elledge created "an unacceptable risk ... of impermissible factors coming into play," Holbrook v. Flynn, 106 S.Ct. at 1347, through the impermissible advantage given to the state by the appearance of Mr. Elledge in shackles.

case, no such showing of a compelling state interest was made and no "close judicial scrutiny" was undertaken of the rumor purporting to require Mr. Elledge's restraint, because the trial judge refused Mr. Elledge's objection and request to be heard in opposition on the question. In Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983), cert. denied, 466 U.S. 941 (1984), the Court of Appeals explained that even in light of the limited scope of federal habeas review,

we do not conclude that the due process clause would not have required an evidentiary hearing here had Zygadlo requested one. We note, however, that Zygadlo did not dispute the factual basis of the judge's decision or request such a hearing and that he suggested to alternative or less obtrusive means of restraint.

Id. at 1224. See also Allen v. Montgomery, 728 F.2d 1409, 1413 n.4 (11th Cir. 1984) (citing Zygadlo for the principle that "due process may require such a hearing if requested by a defendant in a state trial" but noting that Allen did not request such a hearing). As suggested in these opinions, in the proper circumstances, due process requires that an evidentiary hearing be held because a right as fundamental as a fair trial is at stake by the "inherently prejudicial" state action. Where a fundamental right is at stake basic due process must be met before the state may take it away. And the most basic element of due process of law is the right to be heard.⁹ Such a hearing is also a prerequisite to the trial court's undertaking close judicial scrutiny of the need for restraint, and to the ability of an appellate court to review the trial court's decision, for without some record there is no way for a reviewing court to evaluate the necessity of shackling the defendant.¹⁰ Cf. Gardner

⁹ See, e.g., Goss v. Lopez, 419 U.S. 565, 579-81 (1975) (citing cases); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("[t]he fundamental requisite of due process of law is the opportunity to be heard"); Baldwin v. Hale, 68 U.S. (1 Wall.) 531, 534 (1864) ("[p]arties whose rights are to be affected are entitled to be heard...").

¹⁰ To the extent that Dugger's argument that Mr. Elledge was a dangerous person implies that the decision to shackle would have been the same even if he had been provided the opportunity to challenge the decision, the argument is misplaced. "[I]t is no answer to say in his particular case due process of law would have led to the same result because he had no adequate defense on

v. Florida, 430 U.S. at 361.

Accordingly, Mr. Elledge should have been provided a fair and reasonable determination by the trial judge that his shackling in irons throughout his jury sentencing trial was necessary. Zygadlo v. Wainwright, 720 F.2d at 1223. However, the trial judge did not make such a determination. He did not know whether the facts alleged to require restraint -- that Mr. Elledge had learned karate and planned to assault the bailiff -- were true. He was not acquainted with these facts of his own knowledge, cf. Zygadlo, 720 F.2d at 1222, nor did he conduct a fact-finding inquiry to determine even how the sheriff's deputies "knew" of these facts. Faced with Mr. Elledge's personal attempt to contradict these facts, the trial judge summarily cut off Mr. Elledge.¹¹ Thus, in a very real sense the trial judge did nothing more than "defer[] to the [hearsay] opinion of law enforcement officials," Zygadlo v. Wainwright, 720 F.2d at 1223 n.5 (citing Woodards v. Cardwell, 430 F.2d 978, 981-82 (6th Cir. 1970)), which, of course, cannot be a substitute for due process. See United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1980); State v. Moen, 94 Idaho 477, 481 P.2d 858, 860 (1971); Bowers v. State, 507 A.2d 1072 (Md. 1986), cert. denied, ___ U.S. ___, 93 L.Ed.2d 395 (1986).

Such a process of decision-making does not provide the fair and reliable determination of the necessity demanded by due process for shackling Mr. Elledge during his life and death trial. The Court need go "no further ... [to] conclude[] that the practice is unconstitutional." Holbrook v. Flynn, 106 S.Ct. at 1345.

the merits'.... [O]nly 'wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'" Peralta v. Heights Medical Center, Inc., 56 U.S.L.W. 4189, 4190-91 (February 24, 1988) (citations omitted).

¹¹ Dugger insinuates that Mr. Elledge's request to speak regarding the shackling ordered by the judge should not be equated with a request for a due process hearing. The logic of this argument is elusive, however, for what is a request for a hearing if it is not a request to be heard? There is no requirement in the law of an incantation of certain magic words before the Due Process Clause may be invoked.

The Court of Appeals' reasonable opinion presents no issue needing review by the Court.

II

THE JUDGMENT OF THE COURT OF APPEALS IS SUPPORTED INDEPENDENTLY BY A VIOLATION OF HITCHCOCK V. DUGGER, 107 S.Ct. 1821 (1987), DENYING THE EIGHTH AMENDMENT MANDATE OF INDIVIDUALIZED CONSIDERATION IN CAPITAL SENTENCING.

There is an independent basis, left undecided in the final opinion below, that requires the same relief granted by the Court of Appeals: a violation of Hitchcock v. Dugger, ___U.S.___, 107 S.Ct. 1821 (1987). For this reason, even if the Court were inclined to grant Dugger's petition, it would ultimately determine that the judgment of the Eleventh Circuit -- granting the writ and requiring a new sentencing proceeding -- must be sustained. Certiorari should not be granted in these circumstances.¹²

The unanimous opinion in Hitchcock recognized the restriction in Florida law that precluded consideration of all but a narrow statutory listing of mitigating circumstances in determining the appropriate sentence. This statutory limitation existed in Florida law through late 1978 until the Florida court announced its decision in Songer v. State, 365 So.2d 696 (Fla. 1978), which was its first response to Lockett v. Ohio, 438 U.S. 586 (1978). The application of the Florida law's constraint on individualized consideration was seen in Mr. Hitchcock's case in the jury instructions, the prosecutor's argument and in the judge's sentencing order. Hitchcock, 107 S.Ct. at 1824. The Court found in Hitchcock that "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing

¹² The Court has long held that the prevailing party need not cross-petition or cross-appeal in order to "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it." United States v. American Railway Express Co., 265 U.S. 425, 435-36 (1924) (cited in Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970)). See also, Dayton Board of Education v. Brinkman, 433 U.S. 406, 419 (1977); Swarb v. Lennox, 405 U.S. 191, 202 (1972) (White, J., concurring).

judge refused to consider, evidence of nonstatutory mitigating circumstances...." *Id.*

Mr. Elledge's sentencing trial was held in August, 1977, the same time period as Mr. Hitchcock's (February, 1977). Mr. Elledge's sentencing contains the same restrictions upon the consideration of nonstatutory mitigating factors. It thus reveals the same Eighth Amendment violation from the denial of individualized sentencing.

The Court of Appeals' final opinion in this case omitted all discussion of the Hitchcock issue. The court had originally denied relief on this question because it believed that there was some indication in the record that the sentencing judge did not feel limited by the statute and thus the restrictions upon the jury were not determinative. It found "Hitchcock inapplicable," A-40; 823 F.2d at 1448, because in Florida the jury is "merely advisory" and "[t]he trial judge, alone, makes the ultimate decisions as to sentencing in capital cases," A-42; 823 F.2d at 1439. A week after announcing its opinion in this case, another panel of the Eleventh Circuit issued an opinion rejecting the reasoning applied by the Elledge panel. Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987) (such reasoning "would ignore the importance of the advisory jury to the Florida sentencing scheme" for "[u]nder Florida law, a capital defendant is entitled to have a sentencing proceeding before a jury[:] [a] defendant is no less entitled to that advisory jury sentence merely because his original sentencing proceeding was infected by constitutional error").¹³

Mr. Elledge on rehearing pointed out the conflict with Magill and perhaps more importantly the conflict with Florida law. The panel thereafter deleted entirely the discussion of the Hitchcock issue from the Elledge opinion and otherwise denied

¹³ Other than its now-vacated language in the initial opinion in this case, the Eleventh Circuit has never followed such reasoning in reviewing Hitchcock error. Stone v. Dugger, No. 86-3644 (11th Cir. 1988); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987); Messer v. State of Florida, 834 F.2d 890 (11th Cir. 1987); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (en banc); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987).

rehearing and rehearing en banc. A-85; 833 F.2d at 250. It was unnecessary for the Court of Appeals to reach the Hitchcock question because it was granting relief as to another sentencing issue requiring identical relief.

Nevertheless, although not reached in the final opinion, Hitchcock error occurred in this case and would independently support the judgment below. In this case the sentencing judge opined prior to the commencement of the sentencing trial that he "had to stick just to the statutory circumstances" in responding to defense counsel's argument that he should be able to present evidence concerning "the advantages and disadvantages of capital punishment." 4C-6. In accord with the view that only statutory mitigating circumstances could be considered, during the voir dire when defense counsel asked prospective jurors whether they would be willing to consider the fact that "Billy has pleaded guilty" in mitigation, the sentencing judge sustained the prosecutor's objection and charged the jury: "I will instruct you as to what you are to consider at the end." 4C-79-80. Throughout the voir dire the prosecutor sought agreement from prospective jurors that they would "follow the law as his Honor, Judge Futch, gives you at the end of the circumstances...." 5C-122; see also 4C-26, 30, 33, 36.

The instructions given thereafter were "virtually identical to those in Hitchcock." A-41; 823 F.2d at 1449. Prior to the sentencing trial, the judge told the jury:

At the conclusion of the taking of the evidence, and after the arguments of counsel, then you will be instructed on the factors in aggravation and mitigation that you may consider.

4C-198 (emphasis supplied). The corresponding jury instruction in Hitchcock was that "he [the judge] would instruct them 'on the factors in aggravation and mitigation that you may consider under our law.'" 107 S.Ct. at 1824.

At the close of evidence and argument the judge charged the jury in part that: "The mitigating circumstances which you may consider, if established by the evidence, are these: [statutory listing]." 5C-389. The jury's verdict was to be "[b]ased on

these considerations." 5C-390. The corresponding instruction in Hitchcock did not differ in substance: "'[t]he mitigating circumstances which you may consider shall be the following...' (listing the statutory mitigating circumstances)." 107 S.Ct. at 1824.

And there was more. In opening statement the prosecutor told the jurors:

Ladies and gentlemen, as I said, we are limited by the aggravating circumstances. Of course, Mr. McCain, the defense lawyer, is limited by the mitigating circumstances.

5C-203 (emphasis supplied). In closing argument the defense lawyer did not disabuse the jury of the limits on mitigating circumstances when he said:

When you are instructed on the mitigating factors, I would ask you to listen carefully, and to study the mitigation in this case.

The death statute, or the penalty statute, which is part of an instruction which will be read to you-- and, when you listen to that instructions, I would like for you to consider and think about these things.

5C-382-83 (emphasis supplied). Defense counsel nevertheless argued mitigation that cannot fairly be described as falling in the narrow statutory list; however, he tried to shoehorn these circumstances into the statutory listings. He explained the purpose of his above-quoted argument telling the jury to listen to the statute's factors because "with the mitigating factors, I suggest to you that all the mitigating factors -- and, there are several, almost all ... apply to the factual situation and the attitude of Billy Elledge." 5C-382 (emphasis supplied). In short, defense counsel was trying to show that the statutory listing of mitigation was applicable.

Considering the status of Florida law at the time of this proceeding as acknowledged by the Court in Hitchcock, it is not surprising that the prosecutor, defense lawyer, and judge were operating under the law's restriction on consideration of mitigating aspects of the case.

The record in Mr. Elledge's case is virtually the same as that which in Hitchcock led the unanimous Court to conclude "the

proceedings did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ____ (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion)." 107 S.Ct. at 1824.

In Mr. Elledge's case "it could not be clearer that the advisory jury was instructed not to consider ... evidence of nonstatutory mitigating circumstances." Hitchcock, 107 S.Ct. at 1824. The only question that has ever been raised in this case is whether the judge also followed the restrictive application of the statute. The record as a whole in this case does show that the judge did restrict his own consideration so as to exclude nonstatutory mitigation. More importantly, however, because of the importance given to the jury by Florida law, even if the record demonstrated that the judge did not restrict himself, it would not be determinative of the Eighth Amendment violation.

The judge's views in this case were expressed at the very beginning of this trial when he said he "had to strick just to the statutory circumstances," when defense counsel was asking to present evidence that plainly fell outside the scope of the statutory mitigating circumstances. 4C-6. Then when counsel asked prospective jurors whether they could consider the fact that Mr. Elledge entered a plea of guilty in mitigation, the judge sustained the prosecutor's objection and told the jurors, "I will instruct you as to what you are to consider at the end." 4C-80. As set out above, both in preliminary and final instructions, the judge restricted the jury to the statutory listing of mitigation.¹⁴ Thereafter, in his findings in support of the death sentence, the judge referred only to the statutory mitigating factors with no discussion of any of the family or life history evidence that formed the basis of Mr. Elledge's proffered mitigation. 5C-398-99; 2C-26-29. The judge reviewed the evidence regarding Mr. Elledge's diminished mental condition

¹⁴ Cf. Rogers v. Richmond, 365 U.S. 534, 541-42 (1961) (treating the trial judge's jury instructions as indicating the standard the judge himself must have used in determining voluntariness of a confession).

only under the narrow statutory definitions (i.e., "extreme mental or emotional disturbance") and thereby rejected its consideration entirely, as a matter of law. 2C-27.

Although this record is enough to show that the judge acted under the Hitchcock constraint, Mr. Elledge also presented record showings from other cases involving the same sentencing judge. In a case tried prior to Mr. Elledge's resentencing, but during the same pre-Lockett time period, the death sentence was reversed where the Florida Supreme Court found that the same sentencing judge "held the mistaken belief that he could not consider nonstatutory mitigating circumstances." Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). The same trial judge also presided over the case of James Franklin Rose v. State of Florida,¹⁵ where the death sentence was imposed just three months prior to Mr. Elledge's trial. The trial record in that case plainly demonstrates the effect of the judge's belief. In addressing the nonstatutory mitigating circumstances (family background) that had just been argued by defense counsel in Rose, the same trial judge ruled:

THE COURT: A lot of things that you said I agree with, Mr. Bush [defense counsel]. But there are a lot of things that the Court is not able to take into consideration. And mothers are not listed under mitigating circumstances.

* * *

THE COURT: [T]his Court is restricted to those items designated by the legislature.

R4-48-Appendix at 15 (emphasis supplied).¹⁶ There can be little doubt that this judge was operating under the settled law at the time that consideration of mitigating factors was strictly confined to the statutory list.

¹⁵ The death sentence in Rose was later reversed on a ground not relevant here. Rose v. State, 425 So.2d 521 (Fla. 1983).

¹⁶ The Court of Appeals thought these other cases were unpersuasive because they did not "sandwich" the trial in this case. A-44; 823 F.2d at 1449. There is nothing, however, to indicate that anything occurred in the three months between the Rose trial and this case to disabuse the judge of his belief that the statutory mitigating circumstances were the only ones to be considered.

The now-withdrawn opinion below, despite these record showings of the judge's restriction, seized upon a phrase used by the judge during trial as being "an affirmative statement by the state trial judge that indicates he did not feel he was limited to the statutory mitigating factors." A-41-42; 823 F.2d at 1449.¹⁷ Out of context the statement referred to by the Court of Appeals seems very broad: "I don't think I am limited on mitigation to a specific statute." 5C-246. In context, however, the statement has an entirely different meaning than that attributed to it by the Court of Appeals' panel. There was no question of statutory versus nonstatutory mitigation being discussed when the judge made that statement. Rather, the objection the court was answering had to do with hearsay and with whether the defense could introduce the evidence during the prosecution's case. The "statute" referred to by the judge most likely was the portion of the statute permitting hearsay evidence to be introduced in capital penalty proceedings (§ 921.141(1), Fla. Stat. (1977)).¹⁸ The reading of this statement given by the

¹⁷ The standard of review applied by the lower court's original opinion is in this respect quite different from that previously applied by that court and suggested by this Court. Previously the Court of Appeals said its task was to "determine whether or not there is any indication that the sentencing judge felt himself bound as a matter of law not to consider the mitigating circumstances." Johnson v. Wainwright, 806 F.2d 1479, 1484 (11th Cir. 1986), reh. en banc denied, 810 F.2d 208 (11th Cir. 1987). Also, as Justice O'Connor opined "we may not speculate as to whether the trial judge ... actually considered all of the mitigating factors ... [because] Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring).

¹⁸ During the state's case, the defense sought to introduce a photocopy of a letter written by Mr. Elledge to the witness. The prosecutor objected "it is self-serving, and it is no exception to the hearsay rule." 5C-245. The court was concerned with two matters, the hearsay objection and that it was being offered by the defense during the prosecutor's side of the case. The court commented as follows:

THE COURT: I think it is on the wrong side of the case. You have it identified.

I would allow it to be admitted. I don't think I am limited on mitigation to a specific statute.

I would allow it to be admitted on the defense side of the case. We are on the wrong side now.

5C-246. No one was speaking about relevancy or limitations on

lower court and the petitioner Dugger was imaginative but unavailing.

Even were it true that the jury was constrained but the judge was not, however, relief would still be required. Apparently the Court of Appeals would now agree since it withdrew its opinion in this case and has not since followed its reasoning. The jury is critical to the Florida capital sentencing scheme and thus errors occurring in the jury proceedings cannot and have not been deemed harmless simply because the judge is the final sentencer.¹⁹

That was precisely the holding of Magill v. Dugger, *supra* and its reasoning, based on Florida law, is persuasive. It is also the Florida Supreme Court's opinion. Riley v. Wainwright, 517 So.2d 656 (Fla. 1988). Both Magill and Riley involved situations where sentences had been imposed prior to Lockett, but

mitigation at the time. The judge was ruling on two questions--the "wrong side of the case" and the hearsay question. As to the "wrong side" he said that the defense could have the exhibit identified for admission in its own case. His comment regarding the "specific statute" was his ruling on the hearsay objection.

¹⁹ Without variance, where an error is found in the jury proceeding in capital sentencing, the Florida court reverses for resentencing before a new jury, regardless of the correctness of the judge's sentencing findings. There are two separate reasons for this application of Florida law. First, there is an independent right to a jury. From the earliest days of the statute, the right to a jury in a capital sentencing has been treated as being fully equivalent to the Sixth Amendment right to a jury in the guilt-innocence determination, *e.g.*, Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974), and for any error before the jury Florida applies the review standard for constitutional errors articulated in Chapman v. California, 386 U.S. 18 (1967), *see Valle v. State*, 502 So.2d 1225, 1226 (Fla. 1987). The right to a jury if impinged by error requires reversal, regardless of the judge's sentencing findings. *See, e.g.*, Floyd v. State, 497 So.2d 1211 (Fla. 1986).

The second basis for the refusal to disregard jury errors is the "great weight" Florida gives to the jury's verdict. Florida views the jury as "the conscience of our communities," *e.g.*, McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977), and "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors," Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976). Therefore, the Florida court now says it will not "countenance the denigration of the jury's role," nor "condone a proceeding which, even subtly, detracts from [the jury's] comprehensive consideration of aggravating and mitigating factors." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). It is this strong tradition of deference to the jury that gave life to the "significant safeguard [which] the Tedder standard," requires. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

where resentencings had been ordered before the judge alone. The judge-only resentencings occurred after Lockett and therefore the sentencing judges were free to consider nonstatutory mitigation. Independently, the Eleventh Circuit in Magill and the Florida Supreme Court in Riley ordered resentencings due to Hitchcock error, because the jury had been limited in the original sentencing proceedings. Said Riley:

Clearly, our prior cases indicate that the standards imposed by Lockett bind both the judge and jury under our law. We reject the state's argument that a new advisory jury upon resentencing is not constitutionally required under Florida's sentencing scheme. If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process is tainted by that procedure.

517 So.2d at 659.²⁰ In Mr. Elledge's case the sentencing judge expressly relied upon the jury's verdict in imposing the death sentence.²¹

The harm accruing to Mr. Elledge from the Hitchcock error in his case cannot be doubted. Almost the entire case in mitigation presented on behalf of Mr. Elledge depended upon consideration of nonstatutory mitigating factors.²² Mr. Elledge testified that he was twenty-four at the time of the offense. 5C-304. His parents, who were migrant farmworkers, never established a permanent home. Id. During his childhood, his parents lacked concern for his upbringing and constantly argued with each other. 5C-306-307. His mother would "take it out" on the children by beating them with irons, skillets, pans, and other objects. 5C-306-307. When

²⁰ The reasoning is also consistent with the Court's expressed analysis in Baldwin v. Alabama, 472 U.S. 372, 382 (1985) (unconstitutional jury proceedings may be error even though the judge is the final sentencer in a state like Florida "if the judge were obligated to accord some deference to [the jury's verdict]").

²¹ The sentencing order concludes: "Based upon these findings of fact, and based further upon the advisory sentence rendered in this court by the twelve member jury, It is therefore the sentence of this Court ... that you ... be sentenced to Death." 2C-28-29.

²² In Dugger's brief in the Eleventh Circuit he noted his agreement with this when he argued that "[m]uch of the mitigating evidence presented by Appellant was nonstatutory, i.e., Appellant's family background, abuse as a child, his drug and alcohol problems, his remorse and his ability to be rehabilitated." Answer Brief at 6, n.26.

he was only twelve years old, Mr. Elledge could no longer tolerate the abuse he was receiving, so he ran away from home in order to find a place where he could be treated normally. 5C-308. He described the trouble and consequent boys' school commitments he experienced in his early years, and his severe alcohol and drug abuse which began in those years and continued thereafter. 5C-308-311. In addition, he testified about his previous arrests and resulting psychiatric examinations, which had concluded that alcohol, drugs, and "temper problems" had led to his offenses. 5C-311-317.

With respect to the Strack homicide, Mr. Elledge testified that when he was arrested he decided to tell the police everything because he wanted to get professional help to try to understand how he could have done these things. 5C-335-338. Explaining that he knew he belonged in prison, Mr. Elledge testified that he had begun writing in the hope of preventing other young children from ending up as he did. 5C-340-342. Finally, Mr. Elledge expressed deep remorse for the homicide. 5C-343-344.

Petitioner Dugger has never once argued that the nonstatutory mitigating case presented by Mr. Elledge was insubstantial.²³ Plainly that evidence focusing as it does upon character and the core issue of capital sentencing, mental condition, is substantial. Most certainly it cannot be argued that the exclusion from consideration of Mr. Elledge's mitigating case "would have had no effect upon the jury's deliberations." Skipper v. South Carolina, 106 S.Ct. at 1673.

The judgment of the lower court is, therefore, supported independently by the violation of the principles of Hitchcock v. Dugger, *supra* in Mr. Elledge's sentencing trial.

²³ Dugger's sole response to the Hitchcock argument in the Eleventh Circuit was to argue the now-rejected claim that the jury instructions were nonlimiting and that the judge was not limited, an argument that is both factually and legally incorrect.

III.

IF CERTIORARI WERE GRANTED, THE COURT WOULD CONCLUDE THAT MR. ELLEDGE IS ENTITLED TO THE RELIEF ALREADY GRANTED BY THE COURT OF APPEALS ON YET ANOTHER GROUND: INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

In the courts below, Mr. Elledge claimed that he was deprived of effective assistance of counsel in his sentencing proceeding because of his attorney's unreasonable failure to investigate and present a psychiatric mitigation defense, which was his only defense against the death penalty. In Mr. Elledge's view, reasonable counsel would have sought the assistance of a competent psychiatrist and interviewed members of the family in order to demonstrate that he suffered from psychosis, brain damage, and the effects of an abused and battered childhood at the time of the homicide.

The District Court held that "counsel's failure at least to interrogate Elledge's relatives and to seek an expert witness was outside the range of competent assistance," A-22; 823 F.2d at 1445, and the Eleventh Circuit agreed. *Id.* Even though, as the state argued, counsel was aware that no prior psychiatric evaluations had found that Mr. Elledge suffered from psychosis or organic brain dysfunction, he was nevertheless unreasonable in failing to investigate whether Mr. Elledge actually did suffer from these disorders. As the Eleventh Circuit explained,

Elledge's counsel was convinced in 1975 that Elledge was 'crazy'; he continued to hold that conviction in 1977 (i.e., prior to the second sentencing hearing) despite two court-ordered psychiatric evaluations [in 1975] to the contrary. Counsel then discovered, in talking with Elledge, that prison authorities had been treating Elledge with Mellaril and Dilantin while he was incarcerated pending the 1977 sentencing hearing. Mellaril is an antipsychotic medication and Dilantin is an antiepileptic medication. Despite this new information, which supported his already held conviction that his client was 'crazy,' counsel did not seek new expert advice. Counsel's failure to pursue the issue, once its viability was renewed, was inadequate professional performance.

A-19-20 n.10; 823 F.2d at 1444-45 n.10. Accordingly, the Eleventh Circuit concluded, as the District Court had, that "counsel's total failure to investigate possible witnesses, both expert and lay, when he was aware of Elledge's past and knew that

mitigation was his client's sole defense, was unprofessional performance." *Id.* at 1445.

Even though the Eleventh Circuit determined that the "performance" prong of Strickland v. Washington's²⁴ ineffective assistance of counsel standard had been satisfied, it held that Mr. Elledge failed to demonstrate sufficient prejudice to warrant relief under Strickland. The court based this conclusion on two grounds: Mr. Elledge's failure to show that if counsel had conducted a reasonable investigation he would have found a favorable psychiatrist, A-24-31; 823 F.2d at 1445-47, and his failure to convince the district judge that the psychiatric mitigating evidence would have outweighed the aggravating factors in his case, A-31-37; 823 F.2d at 1447-48.

As we will show, the Eleventh Circuit erred in its reasoning. The first ground was flatly contradicted by the record, and the second ground misapplied Strickland's prejudice standard by approving the district judge's subjective assessment of the mitigating evidence as if he were the sentencer, rather than requiring that the evidence be assessed from the perspective of a reasonable juror. Had the record been read accurately and had the proper standard for assessing the effect of the unrepresented mitigating evidence been applied, the Eleventh Circuit would have concluded that Strickland's prejudice showing had been satisfied, and that Mr Elledge was entitled to a new sentencing trial for this reason, as well as for the denial of due process occasioned by the shackling of Mr. Elledge during the sentencing trial.

- A. The record demonstrates a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have produced an expert similar to the one produced in federal habeas proceedings.

In the federal habeas proceeding, Mr. Elledge presented the testimony of Dr. Dorothy Lewis, a psychiatrist who evaluated him in connection with that proceeding, to show the kind of expert testimony which trial counsel could have presented had he

²⁴ 466 U.S. 668, 687 (1984).

conducted a reasonable investigation. The District Court fairly and accurately summarized Dr. Lewis' testimony as follows:

Petitioner suffers from organic brain dysfunction, episodic rages, and paranoi[d] behavior. Dr. Lewis believes that Mr. Elledge becomes especially violent when he feels teased, tricked or in danger. She emphasized that, in her view, the combination of brain damage, witnessing extraordinary family violence, psychotic paranoia, and child abuse produced the disorder that affected Mr. Elledge during the Strack homicide. She felt that Mr. Elledge's disorders caused a rage at the time of the homicide that was ungovernable and beyond his control.

R4-58-22.

In gauging the sufficiency of Mr. Elledge's showing of prejudice, the Eleventh Circuit correctly reasoned that Dr. Lewis' testimony had to be analyzed from two perspectives. First, "the court must determine whether it is reasonably likely that a reasonable attorney, operating under the circumstances of the case and acting in a reasonably professional manner, would have located such a witness." A-26-27; 823 F.2d at 1446. Second, the court must determine whether there is "a reasonable probability that, if adduced at trial, the psychiatric and background evidence presented in his habeas proceeding would have caused the sentencer to conclude 'that the balance of aggravating and mitigating circumstances did not warrant death.'" A-37; 823 F.2d at 1448 (quoting Strickland v. Washington, 466 U.S. at 695). The first of these concerns will be addressed in this section of Mr. Elledge's argument; the second, in the next section (III(B)).

The Eleventh Circuit determined that Mr. Elledge "made no showing that it was reasonably probable that an ordinary, reasonable lawyer, operating under the time and monetary constraints Elledge's counsel faced and using reasonable diligence, would have discovered a psychiatrist who would have testified as did Dr. Lewis." 823 F.2d at 1446-47. Had the Eleventh Circuit read the record accurately, it could not have reached this conclusion. Indeed, Mr. Elledge made the very showing the Eleventh Circuit mistakenly believed he had failed to make.

Mr. Elledge established three facts which, taken together,

demonstrated a reasonable likelihood that his counsel, with reasonable effort under the circumstances, would have been able to present psychiatric testimony similar to the testimony provided by Dr. Lewis. First, he demonstrated that Lewis' ultimate conclusion -- that he suffered "disorders" which "caused a rage at the time of the homicide that was ungovernable and beyond his control" -- was not, as the Eleventh Circuit mistakenly implied, an isolated opinion concerning him. Significantly, one of the two appointed psychiatrists who evaluated Mr. Elledge for purposes of competency and sanity before his first trial in 1975, made strikingly similar observations about him. While this psychiatrist, Dr. Taubel, was not asked to determine whether Mr. Elledge suffered from any disorder that might give rise to a mitigating circumstance as distinct from a competency or sanity defense, he nevertheless observed, as Dr. Lewis later would, that Mr. Elledge's capacity to reign in his anger, once triggered, was severely impaired:

His behavior was undoubtedly psychologically determined in the sense that vast rage was directed towards the woman victim of his anger and his attacks upon the man were impulsive, insensible and ungoverned by any feeling of fright, apprehension or remorse.

Perhaps the most tragic and yet at the same time alarming aspect to the defendant's personality is the fact that he is aware of these dangerous potentialities within himself and he knows his extremely limited capacity to restrain his anger and rage.

PX-1, at 3.²⁵

During the federal evidentiary hearing, Dr. Lewis was asked to compare her observations and impressions about Mr Elledge with those of Dr. Taubel. She explained that she and Dr. Taubel were in agreement that Mr. Elledge's rage at Ms. Strack was behavior over which he had little control, but that they appeared to disagree about why he suffered such rages. As Dr. Lewis testified,

I'm not sure that he [Dr. Taubel] is as, say, neurologically oriented, so that I can't say that he saw it [Mr. Elledge's rage] as evidence of central

²⁵ Exhibits introduced in the federal evidentiary hearing are referred to as "PX" (petitioner's exhibit), followed by the exhibit number.

nervous system dysfunction and episodic dyscontrol.

I think that he saw it more as an unconscious kind of rage over which he had no control. I think his interpretation would be different.

Also, he did not recognize his paranoia, so that I would say the area where we agree is that it was ungoverned and beyond his control, but the interpretation of why is different.

R6-70-260.

This essential observation about Mr. Elledge's episodes of uncontrollable rage had also been made earlier in Mr. Elledge's life, well before the Margaret Strack homicide. More than two years before Dr. Taubel evaluated Mr. Elledge, he was evaluated in relation to an aggravated assault charge in Colorado. Dr. Joseph Stapen, the psychiatrist who concluded that evaluation, reported his impressions as follows:

Mr. Elledge has a childhood history of fighting, aggressiveness, and rebelliousness.... Mr. Elledge related that he is quite sensitive to feelings of intimidation and threatening challenges from others. He often reacts to a threat or challenge from another person with immediate release of defensive rage. He evidently feels so threatened at those times that his only defense is to strike first and immediately in order to stave off the unbearable anxiety of feeling threatened and potentially humiliated for backing down. He reported that he may react in such a way whether he is drunk, high, or sober.... One may argue ... that at times when he is acutely under the influence of large quantities of drugs or alcohol that his judgment is temporarily impaired and that his ability to refrain from doing the wrong is compromised. Mr. Elledge indicated that even when sober, however, there are times when he cannot control his response to a threat or intimidation.

PX-7, at 3.

When asked during the federal evidentiary hearing to compare her finding with those of Dr. Stapen, Dr. Lewis explained,

This is exactly what I'm talking about. He simply didn't give a possible etiology for this, but he described this kind of paranoid, intense sense of threat and lashing out with no control, which to my mind, is a combination of psychotic reaction in a person who is organically impaired and can't control himself. He simply did not make the leap to why isn't that.

R6-70-263-64.

Accordingly, while no expert before Dr. Lewis had diagnosed Mr. Elledge as suffering from paranoid psychosis or brain damage, at least two other doctors had concluded before Dr. Lewis that he

experienced episodes of rage in which he could not control his behavior. Dr. Lewis explained these episodes as caused by psychosis and brain damage; the other doctors posited no explanation. Since the out-of-control rage episodes themselves were the basis for the psychiatric mitigation defense, however, their etiology was of only secondary importance. Mr. Elledge thus plainly established that if defense counsel had but looked, he would have found at least two psychiatrists who had already examined him and who had observed in him the same out-of-control episodes of rage which were the focus of Dr. Lewis' attention.

The second fact established by Mr. Elledge was that Dr. Lewis' theory for explaining the cause of his episodes--particularly the organic basis for them -- was an accepted theory in the psychiatric community when Mr. Elledge was tried. Despite the mistaken view of the Eleventh Circuit, the State did not contest this in the federal evidentiary hearing. During the course of argument at the close of the hearing, Mr. Elledge's counsel responded to an argument he thought counsel for the state had made, which drew into question the psychiatric community's acceptance of ideas like Dr. Lewis' at the time of the trial. Mr. Elledge's counsel took issue with such an argument:

[T]here has been a suggestion by counsel for the state that the theoretical basis for Dr. Lewis' evaluation somehow wasn't available. She talked about DSM-II being the operative classification manual at the time of the trial and has suggested several times that the scientific basis for Dr. Lewis' opinion wasn't around in 1977.

[M]y recollection from the testimony yesterday was that Dr. Lewis' testimony was to the contrary, and there is no evidence otherwise.

Since that statement has been made by the state, however, I feel obliged to read to Your Honor from scientific works on forensic psychiatry, one dated 1958 and one dated 1974, because the state has made this a matter, and I feel as a matter of argument that I have to at least respond.

R7-71-56-57. Counsel for the state objected at this point and explained that Mr. Elledge's counsel had misunderstood the state's argument:

I did not state that the evidence [was not available.
I only talked about that in terms of what she testified as to Dr. Taubel's evaluation was based on DSM-II....

I said DSM-II was the manual that was available in 1975. That's what I said. But I did not say [t]hat Dr. Lewis' ideas were not available. I said the manual that was available was DSM-II.

R7-71-57 (emphasis supplied).

The Eleventh Circuit erroneously read this exchange as the "State's counsel merely acknowledg[ing] that Dr. Lewis was extant in 1977 and had formulated her clinical theories at that time." A-26; 823 F.2d at 1446. The state plainly acknowledged more than this, however, for Mr. Elledge's counsel's professed concern was that counsel for the state "has suggested several times that the scientific basis for Dr. Lewis' opinion wasn't around in 1977." (Emphasis supplied.) When counsel for the state responded, "I did not state that the evidence [w]as not available," the "evidence" she plainly was referring to was the scientific basis for Dr. Lewis' opinion, not simply Dr. Lewis' personal opinion. Accordingly, the state did not contest that Dr. Lewis' theory for explaining the cause of Mr. Elledge's rage episodes was an accepted theory in the psychiatric community when Mr. Elledge was tried.

Moreover, the Eleventh Circuit should have taken judicial notice that the theory underlying Dr. Lewis' evaluation was well accepted in the psychiatric community at that time.

The theory underlying Dr. Lewis' evaluation was a rule of differential diagnosis. The rule recognized (a) that a person's violent, antisocial behavior could be the product either of a major mental disorder, such as psychosis or organic brain dysfunction, or of personality disorder, and (b) that personality disorder alone could not be accurately ascribed as the cause without first ruling out psychosis and organic deficits as contributing factors. In criminal cases, the differentiation of these causes of antisocial behavior is of crucial importance, since personality disorder-caused antisocial behavior is behavior for which the individual is generally held legally responsible, while organically-or-psychotically-caused antisocial behavior is behavior for which an individual is often not held fully responsible. By the time Mr. Elledge was tried in 1977, the rule

of differential diagnosis utilized by Dr. Lewis was well-accepted. See, e.g., R. Slovenko, Psychiatry and Law 400 (1973); S. Arieti, American Handbook of Psychiatry 1161 (2d ed. 1974). For this reason, a leading forensic psychiatrist cautioned, as early as 1958, that

epilepsy [or other brain dysfunction] should always be considered in the psychiatric examination of the suspected criminal.... The associated personality disorder [accompanying temporal lobe epilepsy] is not infrequently characterized by aggressive antisocial behavior. In persons with a long history of antisocial conduct, it is especially easy to overlook the possibility of a temporal lobe lesion....

J. MacDonald, Psychiatry and the Criminal 102-03 (1958).

The third fact established by Mr. Elledge was that defense counsel understood the significance of the new facts he learned from Mr. Elledge just before the 1977 trial and because of this, reasonably would have looked for an expert such as Dr. Lewis. Counsel learned from Mr. Elledge that he had been treated in prison with an antipsychotic medication (Mellaril) and anti-epileptic medication (Dilantin). Counsel knew that the accepted medical use of these drugs was for the treatment of psychosis and epilepsy. Accordingly, the information gave him critical facts upon which to initiate new investigation. In the course of that investigation, he certainly would have encountered, as Dugger noted in the Eleventh Circuit, the prior diagnoses of personality disorder. However, as Dr. Lewis explained in the District Court, all of the medical and institutional records underlying these diagnoses also documented symptoms consistent with a diagnosis of organic brain damage and psychotic paranoia.²⁶ Thus, since

²⁶ For example, the following signs of psychotically paranoid behavior were noted throughout Mr. Elledge's psychiatric history: his inability to function appropriately in the classroom due to frequent fights with students and altercations with teachers, PX-6, at 5-8, which Dr. Lewis explained as a common precursor to psychotically paranoid behavior, R6-70-115-16; his experience of numerous paranoid feelings and his involvement in numerous psychotically paranoid incidents throughout his childhood and adult years, during which he lashed out at those whom he perceived as threatening, despite the objectively minor threat posed by such people, PX-6, at 7-8; PX-7, at 3; see R6-70-118-19. Further, Mr. Elledge's psychiatric records documented many of the hallmark symptoms associated with organically-induced rages, including insignificant provocation for such rages, PX-7, at 3; an aura before rage episodes, id.; an inability to control his behavior during such episodes, id.; and

defense counsel's investigation would have been focused on organic dysfunction and psychosis, he and any expert he engaged would have been looking for and likely would have found these significant facts. Indeed, defense counsel himself testified in state post-conviction proceedings that if he had investigated in light of the new information concerning Mr. Elledge's in-prison treatment, he "[c]ertainly" would have found evidence to present. 1R-33-34.

In light of these record facts, the Eleventh Circuit was simply wrong when it concluded that Mr. Elledge made "no showing that it was reasonably probable that an ordinary, reasonable lawyer, operating under the time and monetary constraints Elledge's counsel faced and using reasonable diligence, would have discovered a psychiatrist who would have testified as did Dr. Lewis." 823 F.2d at 1446-47. To the contrary, Mr. Elledge showed that other psychiatrists, one of whom evaluated him in connection with the Strack homicide, another of whom evaluated him well before then, had developed strikingly similar impressions about his severely impaired ability to restrain his violent behavior. He showed as well that Dr. Lewis' theory for explaining why his capacity for self-restraint was so impaired was well-accepted in the psychiatric community at the time of his trial. And finally, he showed that defense counsel was peculiarly attuned to finding a psychiatrist who would have testified like Dr. Lewis. Accordingly, Mr. Elledge more than satisfied the burden which the Eleventh Circuit mistakenly found he failed to carry.

B. The record demonstrates a reasonable probability that if counsel had performed effectively, the outcome of Mr. Elledge's sentencing trial would have been different.

To determine whether Mr. Elledge had shown a "reasonable probability that ...the result of the proceeding would have been different," Strickland v. Washington, 466 U.S. at 694, the Eleventh Circuit utilized an analysis that is wholly at odds with

a feeling of relief or gratification after the rages subsided, PX-6, at 7. See R6-70-123-37.

Strickland's prescribed analysis. Instead of determining whether a reasonable sentencer could have been persuaded by the evidence adduced in the federal habeas hearing to impose life, the Eleventh Circuit simply determined that the sentencer would not have been so persuaded in Mr. Elledge's case because the District Court was not. It utilized a process of analysis which allows the District Court to make a subjective evaluation of the evidence, and if the District court is not persuaded that it would have sentenced the petitioner differently, permits the conclusion that prejudice has not been established. As the Eleventh Circuit explained,

[A] careful reading of the district court's order shows that the court -- acting within its discretion as factfinder -- gave little weight to the testimony of Dr. Lewis as well as that of Elledge's family members. The district court simply found that no significant mitigating evidence was adduced. Further, when the court weighed the value of Dr. Lewis's testimony, it found that the aggravating factors outweighed those presented in mitigation.

A-35-36; 823 F.2d at 1448. To show that the District court had exercised its factfinding discretion reasonably, the Eleventh Circuit catalogued the various reasons why the district court could reasonably have found the facts as it did. A-32-33; 823 F.2d at 1447-48.

This analysis fundamentally misapplies Strickland's prejudice analysis. Strickland directs reviewing courts to assess the value of the omitted evidence from the perspective of the sentencer, not from the perspective of a reviewing judge who subjectively evaluates the evidence as if he or she were the sentencer. "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695 (emphasis supplied). As the Ninth Circuit has astutely observed in the application of Strickland's prejudice test in the context of the state's withholding of favorable evidence,

The inquiry is not how this or any other judge, as the trier of fact, would subjectively evaluate the evidence. It is, rather, how the absence of the evidence objectively might have affected the outcome of

the trial.

Bagley v. Lumpkin, 798 F.2d 1297, 1301 (9th Cir. 1986) (after remand) (emphasis added). Ironically, the Eleventh Circuit has itself recognized and followed this rule in other cases, noting in Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir. 1986), that the test is whether the omitted evidence "could reasonably have led a jury to disbelieve" the accusations of the state's chief witness, and in Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984), cert. denied, 470 U.S. 1087 (1985), whether in light of the omitted evidence, "the choice between the two interpretations would have been one the jury could have made either way had they heard the facts."

Thus, even if the sentencer in Mr. Elledge's case could have given little weight, as the District Court did, to Dr. Lewis' and the family members' testimony, for the reasons catalogued by the Eleventh Circuit

- "[t]he value of Dr. Lewis's testimony was undercut in part by the revelation that her analysis largely relied on Elledge's recitations and had not been fully corroborated by independent follow-up investigation," A-32; 823 F.2d at 1447;
- "the two court-appointed psychiatrists who examined Elledge each gave damaging evaluations that would have diluted Dr. Lewis's impact," id.; and
- "much of the testimony elicited from Elledge's brother and sister could be used against him" -- because of his violence in contrast with their "emergence as normal citizens even though they had been subjected to similar abuse and neglect," A-32-33; 823 F.2d at 1447

-- the court should have found that Mr Elledge had nevertheless met his burden under Strickland if the sentencer just as reasonably could have given considerable weight to Dr. Lewis' and the family members' testimony. Because of its misapplication of Strickland, however, the Eleventh Circuit failed to consider whether the sentencer reasonably could have done this. Had the Eleventh Circuit considered the evidence from the proper perspective, it would have been compelled to find that the

sentencer could have.

There are three reasons for this:

First, as we have already shown, the two court-appointed psychiatrists' evaluations were not necessarily "damaging" and would not necessarily have "diluted Dr. Lewis's impact." Indeed, at least one of the two agreed with Dr. Lewis that Mr. Elledge suffered from the episodic, uncontrollable rages, which were at the heart of what could have been Mr. Elledge's psychiatric mitigation defense. Even if neither of the psychiatrists agreed with Dr. Lewis that these rages were caused by psychosis and brain damage, their agreement that the rages were uncontrollable could, in a reasonable sentencer's view, have established the defense as a weighty defense.

Second, the Eleventh Circuit's finding that Dr. Lewis' analysis "largely relied on Elledge's recitations and had not been fully corroborated by independent follow-up investigation" -- and the implication from this that her analysis was unreliable -- is manifestly subject to dispute. Reasonable jurors could as readily have found that her analysis of Mr. Elledge was the most reliable ever conducted. Indeed, it was patently clear in the District Court that Dr. Lewis undertook the most thorough evaluation that has ever been undertaken of Mr. Elledge-- spending significantly more time interviewing him²⁷ and gathering, as a result, much more data from him, than any previous forensic psychiatrist; examining his history more thoroughly than any other previous psychiatrist;²⁸ corroborating for the first time by sources independent of Mr. Elledge the

²⁷ Dr. Lewis' clinical interview took nine hours, conducted in three sessions over the course of two days. R4-58-21. In contrast, Dr. Eichert and Dr. Taubel spent one hour interviewing Mr. Elledge together. PX1, at 1.

²⁸ Most of the data gathered by Dr. Lewis was not known by the other forensic psychiatrists who have previously evaluated Mr. Elledge, and that data was crucial to the formulation of Dr. Lewis' opinion. See R6-70-98-138. A compilation of this data was provided to the District court at R5-79-6-7. See also R5-74-27-32 (referenced at R5-79-6-7).

accuracy of his social/psychiatric history;²⁹ and utilizing for the first time in a forensic evaluation of Mr. Elledge additional diagnostic tools beyond the standard psychiatric interview and review of history (e.g., neurological examination, psychological evaluation, and educational evaluation).³⁰

This thoroughness was reflected in Dr. Lewis' testimony before the District Court. Dr. Lewis did not just give her clinical and forensic conclusions. She explained why it was necessary to collect the data that she gathered in relation to Mr. Elledge. R6-70-94-98. She noted every piece of data upon which she relied and indicated whether and how she had been able to verify the accuracy of the data. R6-70-98-138.³¹ She then explained the medical/clinical significance of every piece of data and how that data supported her diagnosis of Mr. Elledge. Id. In light of her clinical impressions, Dr. Lewis described how Mr. Elledge's psychiatric illness and neurological damage contributed to his behavior during the Strack homicide, R6-70-140-141, and how these disorders severely impaired his capacity to conform his behavior to the requirements of law at that time, R6-70-140-141. Finally, she explained in full why she disagreed with the diagnosis of Mr. Elledge as suffering solely from an antisocial personality disorder. R6-70-142-146.

In sum, Dr. Lewis did exactly what a competent psychiatrist is expected to do in a forensic setting to "enable the [factfinder] to make its most accurate determination of the truth

²⁹ See R5-74-27-32 (referencing to the evidentiary record before the District Court the data and the means by which the data were verified independent of Mr. Elledge).

³⁰ See R6-70-91.

³¹ During the course of the testimony before the District court, one of the pieces of data provided by Mr. Elledge -- which Dr. Lewis had been unable to verify -- turned out to be in dispute. Connie Wright (Mr. Elledge's sister) disputed Mr. Elledge's statement to Dr. Lewis that she had initiated and continued a pattern of sexual relations with him. R6-70-24. Dr. Lewis explained how the conflict between Ms. Wright and Mr. Elledge over this series of events did not call into question her opinion respecting Mr. Elledge. R6-70-110-113. More importantly, Dr. Lewis testified that she had been able to corroborate most of the significant data provided by Mr. Elledge through sources independent of him. R6-70-98-138.

on the issue before [him]," Ake v. Oklahoma, 470 U.S. 68, 81 (1985): she "organiz[ed] [Mr. Elledge's] mental history, examination results and behavior, and other information, interpret[ed] it in light of [her] expertise, and then lay[ed] out [her] investigative and analytic process to the [Court]...." Id. The reasonableness of her conclusions are thus self-evident and self-explanatory.³²

Third, the sentencing jury and judge could reasonably have credited the psychiatric evidence notwithstanding that, at first blush, as the District Court and the Eleventh Circuit observed, this evidence might have appeared to be more "aggravating" than "mitigating" -- because it painted a picture of Mr. Elledge "as a violent, aggressive and dangerous person even when he was a child," R4-58-25, and because it portrayed Mr. Elledge in an unsympathetic light in comparison to his sister and brother who grew to be "normal, law-abiding citizens, despite the abuse they suffered as children [along with petitioner] from their mother in a hellish household...." Id.

While it is accurate that Mr. Elledge's history reveals "a violent, aggressive, and dangerous person even [as] a child," the view of this history as aggravating changes when it is understood that this very history -- like the homicide of Ms. Strack -- is symptomatic of Mr. Elledge's illness, not bad character. As Dr. Lewis explained, one of the reasons that she was certain that her

³² While Mr. Elledge was required only show that Dr. Lewis' conclusions could reasonably have been credited in the sentencing process, he has in fact shown more than that. In contrast to the one-hour interview of Mr. Elledge that formed the entire data base for Dr. Taubel's and Dr. Eichert's evaluation, Dr. Lewis has gone to extraordinary lengths to collect, and confirm the accuracy of, all relevant data. While the depth and breadth of the evaluations conducted by Dr. Taubel and Dr. Eichert could have been discredited as "inadequate to serve as a basis for such a serious determination," Hays v. Murphy, 663 F.2d 1004, 1011-13 (10th Cir. 1981) (describing some of the elements of an adequate forensic evaluation); see also United States v. Taylor, 437 F.2d 371, 378 & n.10 (4th Cir. 1971); Rollerson v. United States, 343 F.2d 269, 274-75 (D.C. Cir. 1964); Jones v. United States, 327 F.2d 867, 879-80 (D.C. Cir. 1963), Dr. Lewis' evaluation -- when judged by the same standards -- could not have been discredited but could have been given only the highest credit. Accordingly, Dr. Lewis' conclusions could have been shown not only to be reasonable, but to be the most reasonable of the competing psychiatric conclusions, if there had been any.

evaluation of Mr. Elledge was accurate was that he evinced a life long history of out-of-control violent behavior. R6-70-119. The violent acts described by Mr. Elledge's sister and brother were extremely significant in Dr. Lewis' opinion for two reasons. First, the violent acts quite often were triggered by paranoid misperceptions: "As one probed some of the violent episodes that had occurred, it became clear that many had been in the context of feeling teased or tricked or betrayed or in danger." R6-70-119-120. Second, once begun, Mr. Elledge's violent acts bore the unique hallmarks of organically-influenced behavior: the acts would appear to others as out-of-control and would not be remembered by Mr. Elledge for some time thereafter. R6-70-124, 141. Far from aggravating the picture of Mr. Elledge, therefore, these incidents could have further corroborated a reasonable sentencer's view that Mr. Elledge was genuinely subject to out-of-control episodes of violent rage like the one that led to the homicide of Ms. Strack.

Moreover, while Connie Wright and Daniel Elledge have apparently been able to lead responsible, law-abiding lives, despite also having been exposed to abuse from their mother, the evidentiary presentation in the District Court thoroughly explained how this could be so for Connie and Daniel, but not for Bill. As Dr. Lewis explained, despite their growing up in the same household, Connie and Danny did not suffer the same disabilities that Bill suffered, which led to his violent behavior. R6-70-148-151. Connie and Danny did not suffer from any psychotic thinking or behavior. R6-70-39, 57, 151. Despite having been battered and emotionally abused, "the battering that [Connie and Danny] ... received was nowhere near the quality of battering that [Bill] received...." R6-70-149. See also R6-70-17, 114-115 (testimony of Connie Wright and Daniel Elledge). Connie and Danny never suffered any head injuries similar to those suffered by Bill. R6-70-39, 58, 151. Similarly, Connie and Danny never suffered any memory lapses like Bill. R6-70-39, 58. These differences are what account for Bill's violence and

Connie's and Danny's lack of violence. R6-70-148-151.

Accordingly, although the factors cited by the Eleventh Circuit in concluding that the District Court could reasonably have found that the psychiatric mitigation evidence had "little weight," A-35; 823 F.2d at 1447, might reasonably have led the jury and judge to reject the evidence of psychiatric mitigation, the countervailing factors discussed herein could just as reasonably have led the jury to credit the evidence of psychiatric mitigation. "[T]he choice between the two interpretations would have been one of the jury [and judge] could have made either way had they heard the facts." Smith v. Wainwright, 741 F.2d at 1225. Because the jury's choice could well have "alter[ed] the entire evidentiary picture," Strickland v. Washington, 466 U.S. at 696, Mr. Elledge "has met the burden of showing that the decision reached would reasonably likely have been different absent [counsel's] errors." Id.

The Court could, accordingly, quite readily decide that defense counsel's ineffectiveness is yet another reason -- though rejected by the Eleventh Circuit -- supporting the final judgment of the Eleventh Circuit in Mr. Elledge's case.

CONCLUSION

For these reasons, the Court should deny Dugger's petition for a writ of certiorari.

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Respectfully submitted,

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